Regional competition law enforcement under deep regional trade agreements a developing country perspective

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REGIONAL COMPETITION LAW ENFORCEMENT UNDER DEEP REGIONAL TRADE AGREEMENTS:

A Developing Country Perspective

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ABSTACT

This thesis examines whether regional competition law enforcement systems established under deep regional trade agreements (deep RTAs – i.e. customs unions or deeper forms of economic integration agreements) help to address the major problems faced by developing countries in relation to competition law enforcement. After conducting a comparative review of different kinds of regional competition agreement the thesis demonstrates that regionally integrated competition law enforcement systems under deep RTAs may result in far more significant improvements in competition law protection in developing countries than those under other kinds of regional competition agreement [i.e. stand-alone competition agreements (including both first and second generation agreements), competition provisions in shallow RTAs, and MLATs]. Regionally integrated competition law enforcement systems in deep RTAs might, *at least in theory*, effectively deal with some of the main problems of the developing countries by, among other things, reducing the cost of enforcement, limiting the influence of vested interest groups, improving the ability of competition authorities to impose deterrent sanctions and engaging the bargaining power of the parties in international negotiation. In practice, however, all regionally integrated competition law enforcement systems established under a deep RTA concluded between developing countries suffer from instability, lack of implementation and/or stagnant development. This thesis explains the poor performance of existing regionally integrated competition law enforcement systems established by developing countries by the inadequacy of the broader regional economic (and social) integration design under the respective deep RTAs. Accordingly, the thesis argues that the success of a regionally integrated competition law enforcement system under a deep RTA is in practice depends on (a) the success of deep economic (as well as social) integration between the member states, (b) the coherence of regional competition policy with the broader regional integration arrangements, and (c) political will and adequate institutions in all member states.

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Any remaining mistakes in the thesis are solely mine.

I hope you enjoy reading it!

Deniz

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LIST OF ABBREVIATIONS

ADB	Asian Development Bank
AFTA	ASEAN Free Trade Area
ALBA	Bolivarian Alliance for the Peoples of Our America
ANZCERTA	Australia - New Zealand Closer Economic Relations Trade Agreement
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
CACM	Central American Common Market
CAN	Andean Community
CAP	Common Agricultural Policy
CARICOM	Caribbean Community
CARIFTA	Caribbean Free Trade Association
CCASG	Cooperation Council for the Arab States of Gulf
CCC	CARICOM Competition Commission
CEMAC (a.k.a. UEAC)	Central African Economic and Monetary Community
CJEU	Court of Justice of European Union
CM	Common Market
COMESA	Common Market for Eastern and Southern Africa
COTED	CARICOM Council for Trade and Economic Development
CSME	CARICOM Single Market and Economy
CU	Customs Union
CUTS	Consumer Unity & Trust Society
EAC	East African Community
ECN	European Competition Network
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EFTA	European Free Trade Association
EIA	Economic Integration Agreement
EJI Index	Enforcement Jurisdictional Integration Index [see

	(Petrie 2012)]
EPA	Economic Partnership Agreement
EU	European Union
EVI	Economic Vulnerability Index
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GNI	Gross National Income
HAI	Human Assets Index
IADB	Inter-American Development Bank
ICN	International Competition Network
ILO	International Labour Office
IMF	International Monetary Fund
LDCs	Least Developed Countries
LLDCs	Land Locked Developing Countries
M&As	Mergers and Acquisitions
MERCOSUR	Southern Common Market (Common Market of the South of America)
MFN	Most Favoured Nation
MLATs	Mutual Legal Assistance Treaties
MoU	Memorandum of Understanding
NAFTA	New Zealand –Australia Free Trade Agreement
NAFTA	North American Free Trade Agreement
NCA	National Competition Authority
OECD	Organisation for Economic Cooperation and Development
OECS	Organisation of the Eastern Caribbean States
PISA	Programme for International Student Assessment
PPP	Public Private Partnership
PTA	Preferential Trade Agreement

R&D	Research and Development
RCAs	Regional Competition Agreements
ROW	Rest of the World
RTA	Regional Trade Agreements
RTC	Revised Treaty of Chaguaramas
SACU	Southern African Customs Union
SADC	South African Development Community
SADCC	South African Development Coordination Conference
SICA	Central American Integration System
SIDCs	Small Island Developing Countries
SMEs	Small and Medium Sized Enterprises
TCA	Turkish Competition Authority
TNC	Transnational Companies
UK	United Kingdom
UN	United Nations
UNASUR	Union of South American Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
USD	US Dollars
USSR	Union of Soviet Socialist Republics
VAT	Value Added Tax
WAEMU (a.k.a. UEMOA)	West African Economic and Monetary Union
WTO	World Trade Organisation

CHAPTER 1 INTRODUCTION

Section 1.1 The Research Question

Can '*regionally integrated competition law enforcement*' systems in deep regional trade agreements (RTAs)[1] help to address competition law enforcement problems of developing countries? This thesis will attempt to answer to this research question. In so doing the focus of analysis will be on economic and political dynamics in deep regional integrations, and the influence of these dynamics on regionally integrated competition law enforcement.

Regional cooperation in competition law enforcement may take place at various levels under an RTA.[2] This thesis defines the deepest level of regional cooperation in competition law enforcement under an RTA as '*regionally integrated competition law enforcement*'. In order to qualify as this deepest level an RTA should require (a) adaptation of a regional competition law that is binding on all member states, (b) harmonisation of the national competition legislation of member states, if any, in line with the regional competition law, and (c) establishment of a regional institution that will undertake, or at least coordinate, certain competition law enforcement activities and ensure compliance with the regional competition law across the regional bloc.

Integration of competition law enforcement under an RTA presupposes the transfer of certain powers that would traditionally be exercised by national governments based on their sovereignty rights (such as adjudication on competition disputes, decision on the content of competition laws) to regional institutions. Moreover, adaptation of regional laws and institutions, as well as establishment of a new system for legal enforcement, entails significant financial investment. For these reasons regionally integrated competition law enforcement systems are in practice found only in deep RTAs. It appears that countries find the alignment of wider political, trade and economic interests necessary to agreeing on political and economic commitments required for establishing

[1] For the purposes of this thesis deep RTAs include customs union agreements and deeper forms of regional economic integration agreements. Different levels of regional economic integration are explained in Appendix 1 – Conceptual Clarifications. Meanings of the key concepts used in this thesis (i.e. 'developing countries', 'competition policy', and 'competition law') are also presented therein.

[2] Different forms and levels of regional cooperation in competition law enforcement will be examined in Chapter 3.

a regionally integrated competition law enforcement system. This is the starting point of the analysis of this thesis.

Section 1.2 will explain why the above-mentioned research question is important, and then present the main thesis of this research. Section 1.3 will then explain the method and the limitations of the research.

Section 1.2 Significance of the Research Question

Inadequate legal design, dysfunctional institutions, political interference and severe resource constraints are among the common problems of many developing countries concerning competition policy and law enforcement.[3] The resultant poor state of competition law protection often prevents developing countries from exploiting the full benefits of trade liberalisation, and makes the respective territories an easy target for international anti-competitive action.[4]

Recent years have witnessed an increasing trend among developing countries towards establishing regionally integrated competition law enforcement systems, *inter alia*, for improving the poor state of the domestic competition law enforcement in the respective territories. Although the regional competition law enforcement concept has received some support from competition experts, in practice the implementation of such legal arrangements by developing countries has almost always faced serious obstacles and delays. So far none of the regionally integrated competition law enforcement systems established by developing countries has become fully operative and realised the anticipated improvements for the competition policy. Therefore the difficulties developing countries face on the way to establishing a fully operative regionally integrated competition law enforcement system require further examination.

This section will first provide brief information on traditional remedies against the poor state of competition law protection in developing countries. After recognising the insufficient improvement achieved by these traditional remedies, potential benefits of regionally integrated competition law enforcement systems will be presented. The

[3] The main reasons for the poor state of competition law protection in many developing countries will be examined in Chapter 2.

[4] The lack of a workable competition law regime in developing countries may adversely affect international trade to the extent that the relevant jurisdictions accommodate anticompetitive business arrangements and/or generate significant profits for businesses that involve international anticompetitive behaviour.

section will then outline the stagnancies and delays in the enforcement of the current regional competition law regimes found under RTAs concluded by developing countries, and then present the main thesis of this research on why these regional systems often fail to meet expectations. The way the remaining chapters of the thesis are organised will be explained thereafter.

1.2.1 Traditional Remedies against the Poor State of Competition Law Protection in Developing Countries

Various mechanisms have been developed in order to improve the effectiveness of competition law protection in developing countries. Unilateral solutions sought by countries can be examined in two categories: (a) inclusion of special provisions in domestic competition legislation which aims at achieving certain (economic or social) development related targets, and (b) extraterritorial enforcement of competition laws.

Over the last two decades a great number of developing countries have adopted a national competition law regime either on their own initiative or in order to comply with their commitments to multinational financial institutions.[5] As a way of addressing the economic, institutional and political drawbacks of their domestic legal systems many developing countries have given broader policy objectives [such as achieving economic development, protection of small and medium sized enterprises (SMEs), and (most popularly in South Africa) protection of historically disadvantaged social groups] to their competition legislation. For the same purposes, developing countries have excluded or exempted various business groups or actions from the application of their domestic competition legislation. The effect of these competition policy adjustments on market competitiveness and economic development, however, is at least questionable, primarily because they overlook case-specific market dynamics. Such policy arrangements, on the other hand, might have been useful for gathering the support of politicians and the public to competition law enforcement. Nevertheless, despite such efforts, competition law enforcement has remained inefficient or largely inactive in many developing jurisdictions.

[5] '*More than 120 jurisdictions have enacted competition laws, and roughly 90 of these have come into being since 1990*' (Hyman & Kovacic, 2013a). For an insightful historical review of the evolution of national competition law regimes, see (Bhattacharjea, 2013).

Extraterritorial application of competition law in jurisdictions with established competition law regimes might be seen as an alternative remedy against severe difficulties developing countries face with respect to competition law enforcement. Extraterritoriality may indeed lead to punishment of certain anticompetitive actions that take place within the territory of countries that lack a workable competition law regime. In this respect extraterritorial enforcement of competition law may reduce anticompetitive behaviour in international markets. On the down side, however, extraterritoriality solution would be silent against the restriction of competition in national markets of countries that have no workable competition law regime. Likewise, extraterritorial enforcement of law is likely to lead to political tensions, especially when domestic interests of jurisdictions that are affected by an anticompetitive conduct conflict with one another.[6]

At the international level, besides provision of financial support, there are mainly three methods employed by advanced economies and multinational organisations in contributing to the improvement of competition law enforcement in developing

[6] Extraterritorial application of national competition laws was first exercised by the US in the late 1940s, which led to the development of the *'effects principle'*. In the *United States v Aluminium Co of America (Alcoa)* decision Judge Learned Hand ruled that the US courts are authorised to impose liabilities on conduct occurring outside the US, but having consequences within the US [148 F 2d 416 (2nd Cir.,1945)]. Initially the judgment received criticism of other jurisdictions blaming the US for jurisdictional assertiveness. However, mainly due to the organisational difficulties that the Second World War brought and the strong economic and military power of the US in the post-war world, the dissenting responses of other jurisdictions to the enforcement of the '*effects principle*' by the US were delayed, and this prepared the ground for claiming de facto acceptance of the respective US practice under the principles of international law [(D. J. Gerber, 2010) p. 66-67. Gerber explains that '[u]*nder international law, rejection of a newly asserted principle by a large number of states precludes it from being considered a valid legal principle*' (p. 67). This was not the case for the extraterritorial application of the US anti-trust law]. Today many jurisdictions have adopted the '*effects principle*' or a comparable rule that allows extraterritorial application of their domestic competition laws. [For detailed examination of extraterritorial application of national competition laws of US, EU, Canada, Brazil, Japan, Israel, China, Singapore and Australia, see (Guzman, 2010). For a comparative review of the US's 'effects principle' and the EU's corresponding 'implementation principle', see (Wagner-von Papp, 2012).]
Despite explicit regulations on extraterritorial competition law enforcement, in practice the respective provisions are, for several reasons, invoked only rarely. Firstly, extraterritorial application of domestic laws always receives a degree of animosity and resentment from other jurisdictions. This is mainly because jurisdictions that exercise extraterritoriality make their decisions unilaterally and based on their own interests. Gerber explains that '*[f]oreign interests are taken into account at the discretion of the decisional state, and the extent to which they are taken into account, if at all, depends on the type of domestic institution making the relevant decisions. Where a court is applying legal principles, it is not likely to take such potential foreign impacts into consideration.*' [(D. J. Gerber, 2010), p. 75.] Secondly, the prevailing reciprocity principle of international law arguably sets a limit on extraterritorial enforcement. Lastly, difficult conflicts may occur in cases of parallel extraterritorial legal enforcement of multiple jurisdictions.
Due to the above-mentioned challenges, in practice only jurisdictions with sufficient economic leverage and political power (i.e. mainly the US and then the EU) enjoy any notable outcome of extraterritorial applications. [For a detailed assessment of the US' 'effects doctrine' see also: (Mitschke, 2008), p. 22-25 and the references therein.]

countries.[7] These methods are (a) provision of technical assistance to developing countries on competition law enforcement, (b) inter-jurisdictional cooperation in actual enforcement cases (most importantly, in the form of exchange of information and cooperation in collection of evidence), and (c) establishment of international forums (which gather the representatives of different jurisdictions together) for the discussion of best competition policy designs and enforcement practices and, thereby, encouragement of legal harmonisation through (non-binding) soft law mechanisms. International support is often indispensable to developing countries, especially the least developed, in establishment of their own national competition law regime. Although the support of multinational donors and advisory bodies is vital for many developing countries, external financial and technical assistance is unlikely to be constant or permanent.[8] Cooperation between developing and developed countries in actual competition law enforcement cases, on the other hand, is often hindered by differences in the perception of competition law, different procedural stages and different sensitivities concerning protection of confidential information. Likewise, soft law mechanisms may inspire more cooperation and legal convergence, but they are unlikely to be able to address concerns that may raise conflicting interests between independent jurisdictions.[9]

[7] Different forms and depths of international cooperation in competition law enforcement, together with their potential benefits and limitations, will be examined in Chapter 3.

[8] Gerber observes that the support given by multinational organisations to adoption of a competition law tends to be more significant than the support given to the enforcement of the same law [(Gerber, 2012), p. 269].

[9] Limitations of soft convergence of laws and enforcement practices might be summarised in five items [for a detailed assessment of the '*soft law*' concept, see (Jiang, 2009)]. Firstly, in competition law reviews, countries are likely to make a cost and benefit assessment (not only in the pure economic sense, but also in terms of industrial policies, international relations, etc.) for individual cases, and avoid implementation of the soft law if they believe that the benefits of compliance do not outweigh its costs. Secondly, soft law is completely silent against the lack of domestic enforcement capacity (lack of financial and human resources, political motivation, technical information, etc.) of partner countries. Thirdly, substantive issues, which create a clash of interest between countries, cannot always be regulated on a voluntary basis. Fourthly, soft law provisions can be too broad, too vague or imprecise, which would make the rules open to different interpretations within the extent of country-specific policy priorities [see, (Ana María Alvarez, 2006) - slide no. 37]. Finally, from a political perspective, it has been argued that the negotiations towards soft convergence often reflect the interests of advanced economies rather than those of developing countries, since the former group offers more resistance against changing their domestic laws [see (Gal, 2010a), p. 118]. Moreover, there is a strong argument that the optimal procedural and substantive competition rules for developing countries need to be different from those of developed countries [(Singh, 1999)333999, (Singh, 2002), (Elenor M. Fox, 2011), (Gal, 2009b), (Gal, 2010a). Proposals made by Gal and Singh on divergent goals of competition law in developing countries are discussed in Chapter 2, Section 2.1.1]. Accordingly, due to superior economic power and negotiation pressure of developed countries, any soft convergence rule on competition is likely to be similar or at least not contrary to the regulations of the prominent jurisdictions in competition law enforcement

Moreover, several attempts have been made at elaboration of an international convention on competition law [e.g. World Economic Conference held in Geneva (4-23 May 1927), the Havana Charter, the Draft International Antitrust Code (unofficially known as the 'Munich Draft Code'), efforts within the WTO].[10] Although an international convention on competition policy would increase legal certainty, facilitate greater international cooperation in law enforcement and reduce the cost of enforcement and compliance, negotiations on the subject have so far been unfruitful.[11]

1.2.2 The Current State of Law Concerning Regionally Integrated Competition Law Enforcement Systems

In light of the above one may legitimately conclude that neither amicable regional/international cooperation arrangements nor special design of national competition laws have offered an easy or immediate solution against the weaknesses of competition law enforcement in developing countries.

There is a growing body of research examining the potential benefits of regional competition law enforcement in improving competition law protection in developing countries.[12] Based on this research, one key feature of regionally integrated competition law enforcement systems is that they bear the potential significantly to reduce the cost of legal enforcement for the participating countries (e.g. by providing a forum for

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(particularly, the US and the EU). In this context voluntary efforts towards soft convergence can even be against to the interests of developing countries [see, (Elenor M. Fox, 2011)].

[10] For an historical review of the efforts aimed at establishing an international convention on competition law, see (D. J. Gerber, 2010). For a discussion of the primary grounds and emerging principles of international competition law, see (Noonan, 2008).

[11] Primary reasons for the failure of the relevant negotiations include the different approaches to the objectives and substantive rules of competition law across different jurisdictions, the difficulty in coordinating the individual procedures applied by national competition authorities (NCAs), and the challenges concerning the timing and private content of information exchange between NCAs. Sokol suggests that the potential cross-border obstacles regarding an international convention on competition law can be examined under two categories: procedural and substantive matters. According to the author, the procedural aspect concerns coordination problems such as information sharing and coordination of national competition authorities, whereas the substantive aspect relates to possible divergence of opinion on both legal and economic assessment of substantive competition law provisions [(D. Daniel Sokol, 2010), p. 188]. In addition, negotiation on international competition law has faced strong opposition of some prominent jurisdictions, in particular the US, which were reluctant to agree on an international convention requiring them to change their established practices [(D. J. Gerber, 2010), p. 205]. Likewise, developing countries also opposed an international convention as they were concerned at being unable to comply with such convention, and therefore, at being subject to significant remedies for incompliance. Moreover, developing countries requested special and differential treatment on grounds of their financial, institutional and economic disadvantages in transnational trading. [For an economic perspective on the difficulties of negotiating a competition agreement between developed and developing countries, see (Guzman, 1998), p. 1546-1547.]

[12] See, among others, (Gal, 2010b), (UNCTAD, 2005), (Heimler & Jenny, 2013) and (Drexl, 2012).

pooling resources or by removing duplicated efforts in the collection of evidence of anticompetitive behaviour). This potential could be especially useful for countries with very significant resource constraints, such as island states with micro economies, which cannot reasonably afford a fully functioning national competition law regime.

Another at least equally important promise of regionally integrated competition law enforcement systems is that they may reduce the influence of powerful politicians and business leaders on competition policy and law enforcement. Accordingly, the transfer of certain policy-making and law enforcement powers from national institutions to one or more regional institution(s) may considerably restrict the influence of the national vested interest groups over competition law and policy related decisions.

Moreover, regionally integrated competition law enforcement systems might be politically more preferable to developing country governments since such systems ultimately aim at forming a self-sufficient regional competition law regime, and thereby reducing the dependency of the participating countries on external cooperation.[13]

Table 1 below shows regional competition law regimes under major RTAs concluded by and between developing countries. It demonstrates that the scope of cooperation in competition policy and law enforcement differs significantly across the respective regional blocs. Although all examined RTAs aim at promoting regional cooperation in law enforcement and ensuring coherence between domestic competition policies of their member states, some RTAs embrace purely intergovernmental and voluntary methods to reinforce regional cooperation (e.g. SADC and AFTA/ASEAN), whereas others adopt binding rules for deeper cooperation and regional integration of the competition enforcement practice (e.g. COMESA, CARICOM and WAEMU).

Despite the potential benefits of regionally integrated competition law enforcement, Table 1 below also shows that such arrangements between developing countries have either failed (e.g. MERCOSUR) or led to very ambitious regional competition law regimes with very limited or no actual legal enforcement.[14] The slow or stagnant development of the regionally integrated competition law enforcement systems, and very limited actual enforcement undertaken by regional competition authorities raise

[13] Potential benefits and limitations of regionally integrated competition law enforcement systems will be examined in detail in Chapters 3 and 5.
[14] (Ana María Alvarez, Clarke, & Silva, 2005) – Notes significant enforcement problems of CARICOM, MERCOSUR, Andean Community, COMESA and SADC. On WAEMU see (UNCTAD, 2007), p.9.

major concerns about the feasibility of the use of RTAs to improve competition law enforcement in developing countries. Moreover, the necessity of region-wide legal reform and establishment of new institutions under regionally integrated competition law enforcement systems inherently requires significant financial investment. Multinational advisory bodies and prominent competition law jurisdictions (in particular the EU) are among the primary donors of the projects towards formation of regionally integrated competition law enforcement systems in developing countries. More research on the problems of the existing regional competition law regimes is required to be able to assess the worthiness of the financing provided by the EU and other institutions and jurisdictions.

TABLE 1: Regional Competition Law Regimes under RTAs concluded by and between Developing Countries

RTA	***Type & Date of Entry into Force***	***Cooperation in Competition Policy***
CEMAC	Customs Union (1999)	Regional competition regime is governed by the following two texts: the *'Regulations on Anti-Competitive Business Practices*' (1999 – as amended in 2005)[15] and the '*Regulations On State Practices Affecting Trade Between Member States*' (1999)[16]. These laws prohibit abuse of dominance and restrictive practices, and include provisions on merger control. '*CEMAC Competition Commission*' is the responsible authority for the implementation of the regional competition law and for imposing sanctions. On the other hand, '*CEMAC Regional Council of Competition*' acts mainly as an advisory body. [17] Regional laws do not exclude the adoption of national competition legislation. Three out of six CEMAC member states (i.e. Cameroon, Gabon and Central African Republic) have adopted a national

[15] Regulation No. 1/99-UEAC-CM-639 of 25 June 1999 – and amendments by Regulation No. 12/05-UEAC-639 U-CM-SE of 25 June 2005.
[16] Regulation No. 4/99-UEAC-CM-639 of 18 August 1999.
[17] Before 2005 the Council was the main body competent for the enforcement of the regional competition laws. The 2005 amendments (Regulation No. 12/05) gave this authority to the CEMAC Competition Commission. However, the CEMAC Council, which is composed of people from various professional bodies and civil society, retained some of its powers concerning competition investigation. This has led to criticism in the literature. See, (Mouaffo, 2014). Gal and Wassmer-Faibish note that the CEMAC Competition Council is a '*temporary rather than permanent*' body. The authors warn that the current institutional design of CEMAC creates '*instability and lack of confidence in the new regional institutions*'. [(Gal & Wassmer-Faibish, 2012), p. 311].

		competition law; but of these three member states, only one, Cameroon, has an operative NCA.[18] By March 2014 there had not been any competition law cases decided by the CEMAC Competition Commission.[19]
UEMOA / WAEMU	Customs Union (1994)[20]	The core competition law principles of the WAEMU are found in Articles 88-90 of the WAEMU Agreement (1994). The regional competition regime is complemented by various regulations and guidance papers.[21] According to the interpretation of the law by the WAEMU Court of Justice, 'the *WAEMU Competition Commission*' has exclusive competence to decide on all legal disputes concerning anticompetitive agreements, abuse of dominance and state aid. Although binding on WAEMU member states, the Court's interpretation has not been welcomed by all members. Disagreements in the region on the division of power between national and regional bodies have led to serious disruptions in the enforcement of the regional competition law.[22] Consequently the WAEMU Competition Commission is currently working on a substantial reform plan for the competition regime of the region.[23] By March 2014, there had not been any competition law cases decided by the WAEMU Competition Commission.[24]
COMESA	Customs Union (1994)[25]	Competition laws of the region are compromised in the '*COMESA Competition Regulations*' (2004) and

[18] (WTO, 2013), p. 47.
[19] (Mouaffo, 2014)
[20] The WAEMU Agreement is defined as a 'customs union agreement' by the WTO [http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=97 (accessed on July 23, 2014)]. The WAEMU member states, however, share a common currency, benefit from a common central bank and coordinate most of their macro-economic policies.
[21] These include Regulation No 2/2002/CM/UEMOA of 23.5.2002 concerning anti-competitive practice, Regulation No 3/2002/CM/UEMOA of 23.5.2002 concerning procedures applicable to restrictive agreements and abuse of dominant position; Regulation No 4/2002/CM/UEMOA of 23.5.2002 on state aid; and 02/2002/CM/WAEMU of 23.5.2002 on cooperation between the Commission and national competition authorities of the Member States for the application of Articles 88, 89 and 90 of the WAEMU Treaty. Legal texts of the Union can be found at: http://www.uemoa.int.
[22] As a result of such disagreements '[a]*fter the advent of the community rules, Senegal identified six suspected cartels and abuse-of-dominance cases which were tackled neither by the community body nor by the national competition authority*' [See (UNCTAD, 2011), p. 10]. This clearly demonstrates that incoherence between the design of regional and national policies may make adoption of a regional competition regime a backward rather than forward move towards promotion of competition law protection.
[23](Bakhoum & Molestina, 2012), p. 111. The problems of the WAEMU competition law regime will be examined in more detail in the following chapters.
[24] (Mouaffo, 2014). (Bakhoum & Molestina, 2012), however, note that there are ongoing cases on abuse of dominance (p. 101).

		the '*COMESA Competition Rules*' (2004). The '*COMESA Competition Commission*' is the regional body authorised to enforce the regional competition laws. The Commission commenced to its operations on 14 January 2013. Since becoming operational the COMESA Commission has given weight to the secondary competition legislation, as a result of which various regulations and guidance notes have been drafted.[26] Regional laws encourage member states to adopt a national competition law regime, and anticipate active cooperation between the NCAs of member states and the COMESA Competition Commission. Currently, however, not all member states have a domestic competition law regime in place.[27]
EAC	Common Market (2000)[28]	'*EAC Competition Act*' (2006) and '*EAC Competition Regulations*' (2010) are the main legislation governing the regional competition law regime. Section 37 of the EAC Competition Act establishes a regional institution, *the EAC Competition Authority*, authorised to review and decide all competition law disputes with a 'community dimension' (i.e. cases concerning acts with a cross-border effect within the region). However, by July 2014 neither the EAC Competition Act nor the EAC Competition Authority had become operational.
SACU	Customs Union (2002 – ratified in 2004)	Article 40 of the SACU Treaty requires member states to have a national competition policy[29] and to cooperate with each other in the enforcement of the competition laws. The SACU Treaty, however, does not provide for a common and binding regional competition law

[25] Parties aim to become an economic union by 2018. See: http://programmes.comesa.int/index.php?option=com_content&view=article&id=85&Itemid=139 (accessed on July 21, 2014).
[26] For recently adopted laws and draft legislation: http://www.comesacompetition.org/documents (accessed on July 21, 2014).
[27] See (Dini & Gilfillan, 2014).
[28] The Treaty for the Establishment of the EAC was signed in 2000. The customs union between the EAC member states became operational on January 1, 2005. Five years later, on 1 July 2010, the Protocol on the Establishment of the EAC Common Market entered into force following ratification by all member states. Most recently EAC member states signed the Protocol for the Establishment of the EAC Monetary Union (on 30 November 2013), which is expected to enter into force in the near future. http://www.eac.int/index.php?option=com_content&view=article&id=44&Itemid=54&limitstart=1 (accessed on July 21, 2014). The ultimate aim of the regional bloc is the formation of a political union [see, Article 5(2) of the Treaty for the Establishment of the EAC].
[29] By July 2014, of the five SACU member states only Lesotho did not have a domestic competition law regime.

		regime.
SADC	Free Trade Agreement (2000)	*Declaration on Regional Cooperation in Competition and Consumer Policies* (2009)[30] sets the main frame for regional cooperation. *The Competition and Consumer Policy and Law Committee* (established in 2009) works to foster cooperation and convergence of laws across the SADC region. The Committee, however, meets only once a year, and does not facilitate pre-investigation stage cooperation between the NCAs of the parties.[31] In 2012 the parties established an online database for sharing the decisions of their NCAs with one another.[32] The parties do not anticipate any competition law enforcement activity at the regional level.[33]
ECOWAS	Customs Union (1993)	Major texts governing the regional competition law regime[34] are the '*ECOWAS Regional Competition Policy Framework*' (2007) and, '*Community Competition Rules and the Modalities of their Application within ECOWAS*'[35] (2008). The ECOWAS Competition Authority (established in 2008)[36] is the regional body responsible for the enforcement of the ECOWAS competition laws. The ECOWAS Competition Authority is competent to decide competition law cases with a 'Community dimension'. In parallel to this the ECOWAS regime allows its member states to have domestic competition law regimes. By July 2014 ECOWAS member states were at the stage of ensuring the compliance of their domestic laws with the ECOWAS competition legislation. So far there has not been any case decided by the ECOWAS Competition Authority.
AFTA / ASEAN[37]	Free Trade Agreement (1992)[38]	Cooperation in competition policy is currently based on soft law mechanisms. Major documents concerning regional competition

[30] Available at: http://www.sadc.int/documents-publications/show/SADC_Declaration_on_Competition_and_Consumer_Policies.pdf (accessed on July18, 2014).
[31] (SADC, 2013), pp. 2-3.
[32] Ibid. p. 4.
[33] (Gal & Wassmer-Faibish, 2012), p. 293.
[34] Available at: http://www.comm.ecowas.int/dept/stand.php?id=i_i1_act_add (accessed on July 22, 2014).
[35] Supplementary Act A/SA.1/06/08.
[36] See Supplementary Act A/SA.2/06/08 on the Establishment, Function of Regional Competition Authority for ECOWAS of December 19, 2008.
[37] The Charter of the Association of Southeast Asian Nations entered into force on December 15, 2008. Its signatories are ten ASEAN member states that aim to create a customs union.

		policy are '*ASEAN Regional Guidelines on Competition Policy'* (2010), '*Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN*' (2012), and '*Handbook on Competition Policy and Law in ASEAN for Business 2013'*. The main regional body authorised to *promote* regional cooperation and convergence of laws is the *ASEAN Experts Group on Competition* (founded in 2007).
CARICOM	Customs Union (1973) Economic Integration Agreement (1997)	Articles 173 and 174 of the '*Revised Treaty of Chaguaramas*' (RTC – came into force in 2001) provides the basic rules of the CARICOM competition regime. The body responsible for the enforcement of regional competition law is the '*CARICOM Competition Commission*'. The CARICOM Competition regime is still at the developmental stage,[39] and the CARICOM Competition Commission initially focuses on competition advocacy, capacity building and promoting coherence of the competition laws of CARICOM member states.
MERCOSUR	Customs Union (1991) Economic Integration Agreement (2005)	The Fortaleza Protocol (1997) was the first text aimed at adopting a regional regime of competition in Mercosur.[40] Although the Protocol anticipated enforcement of the regional competition rules by regional institutions, four member states did not ratify it. As a result, Decision 43/10 of December 2010 abrogated the Fortaleza Protocol and instead established a system that simply aims to increase *cooperation* between the NCAs of the member states in competition law enforcement.[41] Currently there is no immediate action plan for reformation of the present system into a regionally integrated competition law enforcement system.
ANDEAN Community	Customs Union	Regional competition laws of the CAN are adopted by the '*Decision 608*' in 2005.[42] The '*CAN General*

[38] Parties, however, aim to become a *common market* (by the establishment of the ASEAN Economic Community) in 2015.

[39] Currently the CARICOM Commission is working on the revision of the Competition Commission Rules of Procedure 2011, a draft guideline on its investigations procedure, and another draft guideline on imposition of fines and other penalties against competition infringement. Recently the CARICOM Commission has also submitted a proposal to the political institutions of the regional bloc for the amendment of the core competition law provisions in the RTC. See (CARICOM, 2014a), pp. 6-7.

[40] Officially, the '*Protocolo de Defensa de la Competencia del Mercosur'* (*Protocol on the Protection of Competition in Mercosur*').

[41] For more information on this process, see (Botta, 2011).

[42] The official title is the '*Decision 608 on the Rules for the Protection and Promotion of Competition in the Andean Community*'.

(CAN)	(1988)	*Secretariat*' is responsible for the enforcement of the regional laws on competition, and when anticompetitive conduct has an effect on intra-regional trade the CAN General Secretariat is competent to take a decision and impose sanctions.[43] However, compliance with such sanctions is to be ensured by the NCAs of respective member states. Moreover, the '*CAN Committee for the Defence of Competition'* was found to assist the CAN General Secretariat and to advise on competition cases.[44] The CAN Tribunal of Justice has recognised that CAN legislation has priority over the legal systems of CAN member states.[45] The regional competition regime anticipates close cooperation between NCAs of member states and the CAN General Secretariat during legal investigation.[46] The author could not find any case on putative anticompetitive conduct decided by the CAN General Secretariat.[47] Cortázar (2012) explains that '*the Decision* [608] *was the outcome of a project with European backing that took 3 years and cost €2 million (...) Not one competition authority brought a single case before the Secretariat, which itself has not initiated even a single case.*'[48]

Table 1 demonstrates that all examined regional blocs formed by developing countries face serious difficulties in establishing workable regional competition policies. Despite these difficulties, developing countries still show notable efforts and make important investments for developing workable regionally integrated competition law enforcement systems. Although there are a few studies on examining regional competition

[43] For more information see http://www.comunidadandina.org/ingles/competencia/competition.htm (accessed on July 22, 2014).

[44] Conclusions or recommendations of the CAN Committee for the Defence of Competition on competition cases are not binding on the CAN General Secretariat. According to Article 22 of the Decision 608, however, the Secretariat must expressly state the reasons of any departure from the recommendations of the Committee. See (IADB, 2013), p. 10.

[45] CAN Tribunal of Justice, judgement no. 491/1987, Sociedad Aktiebolaget Volvo v. Superintendencia de Industria y Comercio (0001-IP-1987). See also, (Botta, 2011), pp. 17-20.

[46] When Decision 608 was adopted not all member states had a domestic competition law regime. Therefore Ecuador and Bolivia were allowed to enforce Decision 608 directly until they establish an own domestic competition law regime [Article 50 of the *Decision 608* authorised Bolivia; and *Decision 616* (of July 2005) extended this authorisation to Ecuador]. Both of the member states enacted a national competition law in 2008 [(Jenny, 2014), p. 11 – lists the 78 new competition law regimes since 1998].

[47] The lack of enforcement is also observed by (IADB, 2013), p.11.

[48] (Cortázar, 2012), p 150. [The author, however, notes that one complaint concerning the regional law on competition advocacy was brought before the CAN General Secretariat by an individual. Cortázar suggests that the reason for the lack of implementation of the regional competition rules might concern the combination of a general scepticism, unawareness of the law, lack of competition culture and budgetary constraints (pp. 150-2).]

agreements, these studies do not adequately explain the reasons for the poor performance of the existing regionally integrated competition law enforcement arrangements.[49] Moreover, most studies on the subject focus solely on competition policy, and competition law provisions, and disregard the economic and political environment in which regional competition law enforcement is supposed to take place.

The novelty of this thesis is that it brings economic theories on regional integration and political governance literature together in order to gain a better understanding of the prerequisites to establishing a successful regional competition law regime among developing countries. Accordingly, the thesis attempts to explain the functioning of regionally integrated competition law enforcement systems in the light of the internal dynamics of broader regional economic (and social) integration arrangements under a deep RTA. It is hoped that in this way the thesis will be able to present a more realistic picture of the suitability of regionally integrated competition law enforcement systems for improving competition law protection in developing countries.

1.2.3 Main Thesis & the Outline of the Research

The main thesis of this research defends the following: '*the establishment of a workable regionally integrated competition law enforcement system under a deep RTA is conditional on the design and success of the broader regional economic (and social) integration anticipated by the same RTA*'. If this thesis is true, then the broader economic (and social) integration aspect of an RTA need to be considered, if not prioritized, in the assessment of the needs of a common regional competition law regime under the same agreement. Accordingly, the answer to the core research question would be heavily reliant on individual characteristics of cooperation under every deep RTA. It is believed that most regional competition law regimes established by developing countries have achieved limited or no success not only because of the design of the relevant regional competition policies and institutions, but also because of the weaknesses of the broader regional integrations between the parties.

The research, which led to the above proposition, is organised into six chapters. Chapter 2 will survey major problems developing countries face in competition law enforcement under three main categories: (i) socio-economic obstacles, (ii) political governance

[49] A valuable contribution in the Latin American RTAs context is (D Daniel Sokol, 2008).

problems, and (iii) difficulties deriving from legal traditions and institutions. In light of these identified problems, Chapter 3 will examine different forms of regional/international cooperation arrangement on competition law enforcement. It will demonstrate distinctive features of 'regionally integrated competition law enforcement systems' as compared with other regional cooperation arrangements addressing the common problems of developing countries, and economic and political costs of regional cooperation. This chapter will demonstrate that deep economic integration itself may have a positive influence on regional competition law enforcement. Moreover, the main thesis of this study (i.e. the dependency of the success of a regionally integrated competition law enforcement system on broader regional integration design) will be established on the significance of the economic and political commitments regionally integrated competition law enforcement systems entail. In line with this main thesis, Chapter 4 will examine the economic and political motives for the conclusion of deep RTAs. The chapter will then assess the role of the competition policy in deep RTAs within the broader perspective of economic and political dynamics in regional integrations. The research will suggest that competition policy is not among the core objectives of deep regional integrations. In line with this complementary role of the competition policy in regional integrations, Chapter 5 will examine major limitations a regionally integrated competition law enforcement system may face due to its conditionality on the broader economic (and social) policy arrangements under the relevant deep RTA. The chapter demonstrates that when regional economic (and social) integration policies under a deep RTA are generally dysfunctional, even finding the optimal policy design for the regionally integrated competition law enforcement system will not be sufficient to making the system operational. It is therefore suggested that regional competition law should be designed and implemented upon consideration of wider economic and political interests of all member states of a deep RTA. Moreover, it is argued that a level of advancement in regional economic (and social) integration might be necessary for member states of a deep RTA to honour their economic and political commitments to establishing a workable regionally integrated competition law enforcement system. Moreover, these dynamics should ideally be considered in competition advocacy campaigns at the early stages of regionalisation. Chapter 6 will summarise the findings of the thesis, and then offer conclusions.

Section 1.3 Method & The Limitations of the Research

This research is an interdisciplinary study. The legal analysis is informed by economic theories on regionalisation and political governance literature.

The main reason for preparing this study in an interdisciplinary manner is that 'regionally integrated competition law enforcement systems' examined in this thesis are found only in deep RTAs. The most likely explanation for this occurrence is that alignment of wider political, trade and economic interests is considered to be necessary for countries to agree on political and economic commitments required for establishing a regionally integrated competition law enforcement system. If true, then it needs to be recognised that competition provisions in an RTA do not operate fully independently of other economic and political arrangements under the same agreement. From this perspective, examination of the economic theories on regionalisation and political dynamics concerning the negotiation and implementation of RTAs is considered to be indispensable to understanding the de facto limits of regionally integrated competition law enforcement systems, and to answering the core research question of this thesis.

A potential weakness of the thesis, however, is that it includes limited empirical data from existing regional blocs formed by developing countries. There are two reasons for this limitation. Firstly, the author believes that a deep understanding of the theoretical grounds of regionally integrated competition law enforcement systems is the initial requirement of a healthy assessment of the actual regional competition law enforcement practices of developing countries. Secondly, regionally integrated competition law enforcement systems in the existing regional blocs formed by developing countries are either not yet fully operable or have produced only a very limited number of competition law judgments.[50] Due to the primitive stage of regional competition law enforcement in regional blocs formed by developing countries, an empirical study of the effectiveness of the respective legal arrangements would unlikely to be statistically

[50] For instance, the COMESA Competition Commission became operational only in 2013 (although the COMESA Competition Regulations were adopted in 2004). Similarly, although the CARICOM Competition Commission (CCC) was inaugurated in 2008, there are only two judgments concerning the same case published in the CCC's official website as of September 2014 - *Trinidad Cement Limited v The Competition Commission* [2012] CCJ 2 and 4 (OJ).
[See, http://www.caricomcompetitioncommission.com/en/registry/notices-and-decisions (accessed on September 4, 2014).] Likewise, the regional competition law of the WAEMU entered into force in 2003, but the provisions of the act have raised serious concerns among the NCAs of the member states, in particular of Senegal. Therefore, currently WAEMU member states are negotiating a substantial change to the respective regional competition laws and institutional arrangements.

significant and robust. Therefore, this thesis did not prefer to focus on collecting empirical data on the current practice of regional blocs formed by developing countries.

The research method of this thesis is mainly based on the review of primary and secondary documentary material. Several RTAs have been examined in the assessment of the conceptual grounds of regional integration. Access to the English texts of most RTAs has been provided from the databases of the World Bank and the WTO. [51]

Policy statements, future project reports, and annual reports of regional blocs formed by developing countries have been helpful in understanding the anticipated level of regional cooperation under respective RTAs.

Studies of international organisations, particularly the UNCTAD, WTO and OECD have been useful, especially in obtaining statistical data.

Academic studies in the areas of economics, political governance and competition law comprise the secondary documentary material.

[51] See, http://wits.worldbank.org/gptad/library.php, and http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (accessed on April 29, 2011).

CHAPTER 2 MAJOR PROBLEMS CONCERNING COMPETITION LAW ENFORCEMENT IN DEVELOPING COUNTRIES

Introduction

Strikingly, between 1990 and 2013 the number of jurisdictions that have their own national competition law regime had risen from 16[1] to 120[2]. Proliferation of national competition law regimes usually indicates a wider acknowledgement of the role of competition policy in availing the benefits from free market economies. In this regard, competition advocacy work of multinational donors and advisory bodies (such as the IMF, World Bank, UNCTAD, OECD, WTO, EU and ICN) has played a key role in the dissemination of new competition legislations across developing countries. As a part of their advocacy work, these bodies have been supporting the policy-making process in developing countries mainly by providing financial aid, and technical assistance on core competition principles and their enforcement. Furthermore, certain multinational donors have obliged developing countries to pass national competition legislation by making their debt repayments conditional on such legal reform.[3] In addition to the active role of multinational donors and advisory bodies, bilateral and multilateral trade agreements have also played a role in raising awareness of competition policy across developing countries. Today, competition policy provisions have become a common feature of most RTAs.

Despite this increasing attention to the necessity of having a national competition law regime, in many developing countries the *enforcement* of competition law is still at the primitive stage. The reasons for this under-enforcement can be found in different facets of socio-economic traditions and political governance in the respective countries.

This chapter aims to explain the dynamics of market competitiveness in developing countries, and to demonstrate the major problems developing countries face in relation to competition law and enforcement. The core research question of this thesis is whether regionally integrated competition law enforcement systems in deep RTAs can help to address competition law and enforcement related problems of developing countries.

[1] (Singh, 2002), p.6.
[2] (Hyman & Kovacic, 2013a).
[3] (Dabbah, 2010), pp. 460-1.

Examination of the major competition law enforcement problems of developing countries will set the scene for the analysis of the extent that regional competition law regimes adopted under deep RTAs and other forms of regional competition law arrangements can help improving competition law protection in developing countries.

There is a broad literature examining distinctive features of market competition in developing countries.[4] Based on this literature, factors that may influence competitiveness of developing countries and the major problems faced by the respective countries in relation to competition law and enforcement will be examined below under three core categories: socio-economic factors (Section 2.1), problems deriving from political governance (Section 2.2), and difficulties related to legal environment (Section 2.3). Findings will then be stated and assessed, particularly on the inter-related nature of the identified socio-economic, political and legal/institutional struggles, and conclusions drawn (Section 2.4).

Section 2.1 Socio-Economic Aspect

The influence of socio-economic factors on competition law and enforcement will be examined below under four headings: (i) limited domestic demand and poverty, (ii) informal economy, (iii) limited budget for the basic public services, and (iv) weak consumer groups and low awareness of competition policy.

2.1.1 Limited Domestic Demand and Poverty

Most developing countries struggle with limited domestic demand in their markets. Limited domestic demand is often a result of (a) small geographical size, (b) low population density *and* weak transport infrastructure, and/or (c) the poverty of consumers. When there are significant barriers to international trade, low demand in domestic markets of a developing country may result in lack of competition in the respective markets. Accordingly, low demand may allow only one or few firm(s) to operate profitably in the local industries and therefore lead to high market

[4] Among others: (Kovacic, 2001), (Kovacic, 1997), (Gal, 2009a), (Gal, 2002b) p. 605, (Gal, 2002a) p. 303, (Gal, 2009b), (Gal, 2009c) p. 417, (Dabbah, 2010), (Laffont, 1998), (Matheus, 2010) p. 275-300, (Matheus, 2013), (UNCTAD, 2004), (UNCTAD, 2002).

concentration. For this reason, most industries in developing countries are characterised by oligopolistic or monopolistic market structures.[5]

A highly concentrated market structure in developing countries invites two questions. Firstly, what are the broader social and economic consequences of high concentration in markets? Secondly, do socio-economic and political endowments of developing countries require any special adjustment in competition policy, and more specifically in substantive law of competition?

The answer to the first question primarily depends on how far a country has opened its markets to foreign trade and investment. If a country preserves high barriers to international trade and investment (as in many developing countries), then limited domestic demand will lead to production below minimum efficient scale in many sectors. Due to low domestic demand most local firms will not grow, and thereby offer limited employment opportunities to the public. This in turn will harm the overall wealth of consumers, and may, *ceteris paribus*, stabilize low domestic demand.[6]

Even when developing countries largely eliminate barriers to free trade, *coordination failures* in the production process may significantly increase the cost of doing business.[7] For example, the cost of establishing a successful processed food business may require additional investments both to upstream (to ensure steady, reliable and quality supply of raw materials) and downstream markets (to ensure efficient and reliable delivery to

[5] Gal reaches to the same conclusion from the overlapping perspective of small economies [see (Gal, 2002a), p. 6]. According to Gal, '*a small economy is an independent sovereign economy that can support only a small number of competitors in most of its industries.*' Therefore, the main characteristic of a small market economy is the highly concentrated nature of most of its industries due to smallness. Similarly, most developing countries also suffer from high concentration in their local industries. However, lack of competition in local markets of developing countries is a result of not only the small size of the respective economies but also other economic and non-economic factors (such as low GDP per capita, institutional difficulties and political corruption). Therefore, small economies concept as defined by Gal is not always suitable to evaluate the economies of developing countries. In another study, Gal also makes a clear distinction between 'small economies', 'developing economies' and 'transition economies', in terms of scarcity of resources. She notes that while developing economies endure scarce financial and human resources, due to their lower level of development, the main struggle of small economies lies in the lack of financial resources rather than human endowments. Gal indicates that small market economies do not face any significant human resources restriction, with respect to the educational level and capacity of competition professionals; that said, restricted financial resources affect the quantity of skilled professionals employed by the small economies. She also notes that transition economies usually suffer from the lack of adequate human resources since professionals in transition economies are typically educated for a planned economy instead of a market economy system. See (Gal, 2009c), p. 421.

[6] The link between low domestic demand, inefficient firms and limited employment opportunities may be seen as a vicious circle in closed economies.

[7] (Rodrik, 2013), p. 30.

domestic and foreign markets).[8] This may not only complicate the operation of the business, but also significantly increase the cost of production and thereby hinder market entry.

In addition, when low demand leads to sub-optimal levels of production an economy may become dependent on imports from other jurisdictions. Moreover, under-production in certain markets may also create a dependency on imports of intermediary products in the relevant downstream markets. The resultant external dependencies may render the domestic economy more vulnerable to crises, price fluctuation and anti-competitive behaviour beyond its borders.

Lastly, inefficient production is less likely to trigger technological development, which deteriorates the disadvantageous position of local firms in global markets. Even when the laws of a developing country encourage cross-border trade, low domestic demand and inferior technology and machinery used by developing country firms may give these a competitive disadvantage in accessing global markets, and thereby reduce the volume of exports. By contrast, there is economic evidence that exports may provide a means of achieving economic development both at company and national level in developing countries.[9] Accessing international markets might gain developing country firms the demand required for producing on efficient scale, and stimulating learning and innovation. It is suggested in the literature that '*export promotion*' is a surer source of dynamic efficiency than '*import liberalisation*'.[10] Even when open trade restrictions on imports and exports are abolished, developing country firms may find accessing foreign markets very costly and challenging. In this regard the difficulties developing country firms often encounter may include *inter alia* high transport costs (including those derived from being land-locked, lack of necessary infrastructure, not reaching scale economies in shipment, packing and storage in order to preserve the good condition of the products), language barriers, and the presence of more established firms in the

[8] Ibid.
[9] For an assessment of the successful Korean example, see (Hur, 2004). According to Hur, '[t]*hroughout the 1960s and the 1970s, the Korean government pursued the so-called unbalanced growth strategy that strategically concentrated its financial and tax support on export-oriented industries. As a result, Korea achieved remarkable economic development, thereby increasing its GDP by 30-fold (US$ 21 billion in 1961, US$ 616 billion in 1979) and GDP per capita by 20-fold (US$ 81 in 1961, US$ 1647 in 1979) in less than 20 years*' (ibid., p. 228). With respect to the majority of developing countries with low industrial capacity (particularly in Africa and Latin America), the growth of exports of manufacturers was small or moderate; see (Shafaeddin, 2005). For empirical studies of positive effects of export-growth orientated policies on economic development see, *inter alia,* (Balassa, 1978), p. 181-189; (Balassa, 1985), p. 23-35 and; (Fosu, 1990), p. 831-835.
[10] (Mytelka, 1999) as quoted in (UNCTAD, 2002), p. 14.

markets. Furthermore, most countries legally require additional investments as a precondition of allowing exports into their national territories.[11] Companies from developing countries which produce at inefficient scale or with older technologies are often unable to meet such investment requirements.[12]

The orthodox answer to the second question (i.e. whether the above market characteristics require any special adjustment in competition law and policy) is negative.[13] Accordingly, competition law should only focus on the economic dynamics in defined relevant markets, rather than considering the broader economic policy objectives of the respective jurisdictions. Therefore general trade and investment policy concerns should be addressed outside competition legislation. In practice, however, developing countries usually tailor various policy tools to intervene in market failures and to improve their disadvantageous position in integrating into international markets.

The most obvious way to address market failures deriving from limited domestic demand is to embrace open trade policies and create a legal and institutional environment that stimulates FDI. In this way goods and services of foreign firms would promote competition in domestic markets of the host country, while at the same time foreign trade may help disseminate new technologies from foreign to local firms, and encourage innovation.

Elimination of barriers to foreign trade and investment, however, might not be always possible or desirable for political reasons. For example, a country may wish, for strategic purposes, to be largely self-sufficient in certain key industries. In the Cold War period the protectionist policies of the EU member states in the agricultural sector might be explained by such political motives.[14] Moreover, internal and external lobbies or

[11] (G. K. Lipimile, 2004).
[12] See also, (World Bank, 2001).
[13] See the results of an ICN survey on competition law in small economies. The survey demonstrates the contributions of 25 jurisdictions across the world with different market sizes and different levels of economic development. A great majority of the respective jurisdictions suggest that the small size of an economy should not influence substantive rules on competition. (Instead of providing quantitative data, the report summarises the opinions of all jurisdictions on the subject. Accordingly, although some jurisdictions defend the need for special adjustments in terms of efficiency considerations and the level of concentration required for optimal operation of certain individual markets, the common view is that the basic principles of competition law should have universal application. The report does not discuss the ways of reflecting the proposed 'special adjustments' in competition laws of small economies in any detail.) See (Swiss Competition Commission and Israeli Antitrust Authority, 2009), pp. 5-11.
[14] The Common Agricultural Policy (CAP) of the EU dates back to the Treaty of Rome, establishing the European Economic Community (EEC) of 1957. According to Article 39 of the Treaty of Rome, the initial aim of the CAP was to increase agricultural production and thereby ensure food security within Europe. Over time the policy has been reformed many times, and today it aims to strengthen the

vested interest groups may insist on trade concessions. A level of protectionism, on the other hand, might be reasonable when the presence of foreign firms in the host country is limited to readily imported products, and when cross-border trade is not realised in the context of a deep regional integration. In this case imported goods of foreign firms might replace inefficient production of domestic firms in the host country. Although this is desirable from the perspective of competition policy, the jobs lost as a result of the removal of inefficient domestic firms might not be easily replaceable when the activity of foreign firms is limited to supply of goods that are produced elsewhere. On the other hand, when such cross-border trade occurs in the context of a deep regional integration, free movement of workers and capital in particular might in the long term help offset the damage caused by the removal of jobs in the host country.[15]

In her thoughtful study on competition law in small-sized economies, Michal Gal suggests that the '*first-best solution*', to promote competition in small-sized economies, is to reduce barriers to trade.[16] The author, however, argues that competition law and policy can be functional where trade barriers could not be completely removed or when unrestricted trade access is not sufficient to solve a small economy's efficiency problems.[17] Gal explains that competition agencies in small-sized economies should then recognise the high concentration levels as a '*necessary evil*' in achieving productive efficiency. In line with this, she suggests that small-sized economies should adopt more flexible merger control laws, and allow certain cooperative agreements between firms which have the potential to increase productive or dynamic efficiencies. In addition the author recognises that small-sized economies may need to regulate natural or non-natural monopolies more often than do larger economies, as the effect of dominance tends to be higher while the self-correcting tendencies of the markets are less specific in smaller economies.[18] Gal's proposals are well informed by economics of competition, and likely to improve competitiveness in small economies when applied correctly. On the downside, however, both increased market regulation and permission to concentration of the markets subject to increased efficiencies are likely to complicate competition law enforcement. Moreover, from the perspective of developing countries,

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competitiveness and sustainability of agriculture and rural areas in the EU. See, (European Commission, 2012).

[15] This point will be elaborated in Chapters 4 and 5.

[16] (Gal, 2002a), pp. 306-7.

[17] Ibid.

[18] Ibid., pp. 317-25, 333-4.

essential market data for the relevant assessments may not be accessible, and competition agencies as well as courts may lack the required technical skills, at least in the initial stage. In addition, in the absence of adequately designed and financed institutions and clear and unambiguous laws, giving extensive weight to efficiencies may increase rent seeking in competition law enforcement.

As a response to market failures that are common in many developing countries Singh proposes a far more protectionist policy design. According to Singh, '*the purpose of competition policy* [in developing countries] *cannot simply be the promotion of competition as a good thing per se, but to foster economic development*'.[19] In this regard, he defends the concept of '*optimal degree of competition*' on the ground that too much competition would lead to price wars and sharp falls in profits, which would be a disincentive to private investment. Singh also suggests that governments of developing countries need to coordinate investment in order to prevent over capacity and falling profits. In objecting to the application of the '*national treatment*' principle[20] promoted by the WTO for international trade agreements, he suggests that: "*(...) it is necessary for developing country governments to control (a) the timing of the FDI; (b) the total amount of FDI; as well as (c) the selection of large projects by multinationals.*"[21] Singh's proposals do not extend to application of different substantive laws of competition in developing countries, although he clearly defends careful economic planning of governments and positive discrimination for domestic firms of developing countries.

Two criticisms might be levelled against Singh's proposals. On the one hand, the potential influence of such an approach on FDI has not been discovered. Even on the assumption that developed countries have officially accepted discriminatory policies of developing countries, such policies may nevertheless discourage investment of private investors. Given the importance of FDI for economic development and technological improvement of developing countries, the risks attached to the abolition of '*national treatment principle*' need to be assessed cautiously.

On the other hand, Singh's proposals, like Gal's, require a strong state that is equipped with the necessary technical, financial and human resources to conduct complex policy

[19] (Singh, 2002), p. 15.
[20] The national treatment principle requires equal treatment of imported and locally-produced goods and services.
[21] Ibid. p. 20.

analyses. However, due to the lack of necessary resources, influence of vested interest groups over the governments and asymmetric information inflows to developing countries, it is believed that the beneficial outcome of the coordination of investment by developing country governments cannot be taken for granted. On the contrary, when a country suffers from a high level of corruption, direct governmental control of investment may increase rent seeking behaviour, and lead to more inequitable income distribution. Arguably, in the presence of practices that significantly overshadow good governance, adoption of less complex competition policies and fully transparent procedures might be more desirable for developing countries.

In light of the above it may be concluded that limited demand and poverty may significantly reduce competitiveness of production in developing countries. Although the literature suggests that completion law and policy might help to address these issues, so far there has been no consensus on how best to secure the proposed competition law and policy outcomes. Likewise, deficiencies in legal enforcement and administrative governance in many developing countries make potential benefits of such legal adjustments obscure.

Other modes of government intervention in markets and relevant competition policy concerns will be examined in the following sections.

2.1.2 Informal Economy

In broad terms informal economy refers to '*economic activities or income that are partially or fully outside government regulation, taxation, and observation.*'[22] Although there is uncertainty about the boundaries of the 'informal economy' concept, it is clear that informal economic activity has some negative implications for society.[23] Most evidently, businesses operating outside government regulation evade taxation and social contributions, which in turn creates a loss in government revenue. Reduced social security and tax contributions, on the other hand, often lead to higher tax burdens on registered workers.

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[22] The above definition is used by the World Bank at http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTLM/0,,contentMDK:20224904~menuPK:584866~pagePK:148956~piPK:216618~theSitePK:390615,00.html (accessed on April 10, 2014).

[23] See, (Godfrey, 2011), pp. 236-42. (Godfrey discusses different definitions of the 'informal economy' concept under various disciplines.)

From a social security perspective, noncompliance with government regulation often means less job security, lower wage, and absent or limited social benefits for workers.[24] On the positive side, however, informal economy might be a source of job creation and a safety net for the poor, especially in developing countries.[25]

Lastly, from a legal point of view, ubiquitous noncompliance to government laws and regulations may risk undermining the rule of law and the credibility of governments in the eyes of the public.

An informal economy accounts for a significant part of the economic activity in most developing countries.[26] In addition, local businesses established in developing countries are often of very small size.[27] The reasons for the sheer size of the informal economy in most developing countries might be explained by two factors. Firstly, economic activities outside the government regulation might be attributable to limited education and skills of the operators of small firms who might not be aware of the regulations and official procedures for compliance. Secondly, small firms that suffer major resource constraints might be unable to afford compliance with government regulations.[28]

A large informal economy in developing countries might obstruct the efficiency of implementation of competition law and policy. Because informal economic activities are off the official records and unobserved both competition agencies and firms might not be able to make a healthy estimation of the level of competition in their markets, individual market shares of incumbent firms, and potential for future competition and market entry. Besides, when the informal economy is large noncompliance with government regulations might gain public acceptance despite being unlawful. This

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[24] (Bacchetta, Ernst, & Bustamante, 2009), p. 38. Authors note that '[f]*or example, in Colombia*'… *workers in certain segments of the informal economy received only half of the income of a formal worker, even when controlling for job and worker characteristics.*'

[25] http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTLM/0,,contentMDK:20224904~menuPK:584866~pagePK:148956~piPK:216618~theSitePK:390615,00.html (accessed on April 10, 2014). (Bacchetta et al., 2009), however, estimates that developing countries lose up to 2 percentage points of average growth due to their informal labour markets.

[26] According to the International Labour Office (ILO), "[i]*nformal employment comprises one half to three-quarters of non-agricultural employment in developing countries: specifically, 48 per cent of non-agricultural employment in North Africa; 51 per cent in Latin America; 65 per cent in Asia; and 72 per cent in Sub-Saharan Africa.*" (Chen et al., 2002), p. 7. For the years 1999-2000 Schneider estimated that the informal economy within the official GDP's of developing countries in Africa was 42 per cent; in South and Latin America 41 per cent; and in Asia 26 per cent. See, (Schneider, 2002), pp. 4-10.

[27] (Canagarajah & Sethuraman, 2001), p. 4.

[28] Ibid. Noncompliance with law might be a bigger challenge for competition law, as public awareness of it tends to be lower than of many other legal areas.

might make ensuring compliance with competition law and raising awareness of competition regulations among consumers and businesses a daunting task.

2.1.3 Limited Budget for Basic Public Services

Poverty of consumers, small market size and massive informal economic activity all adversely influence the budget and, accordingly, the regulatory abilities of developing country governments. One result of limited financial resources of developing country governments is the inability to make the required investments in basic public services. In this regard, as noted above, poor condition of physical infrastructure (e.g. in transport, communication, water, electricity) increases production and distribution costs for companies, reduces their competitiveness and hinders integration of developing countries into global markets.

Limited government resources often lead to poor education levels, in particular in the periphery of developing countries.[29] As a result of the poor education system the majority of the working population in developing countries usually consists of low-waged, unskilled workers. In addition, developing countries with deficient education systems often face a lack of skilled workers to undertake complex governmental tasks and judicial duties. Likewise low education levels adversely affect technological development and the capacity of developing country firms to absorb new technologies.[30] During the process of technological learning firms need to contact various agents, collect information, seek relevant experience, be involved in continual upgrading, deepen intellectual knowledge and, more importantly, allocate certain funds only to the technological learning itself. Due to human and financial constraints transmission of technological knowledge from TNC's to developing country firms might not be easily achieved.

Developing countries usually struggle to allocate necessary resources to enforcement by their competition agencies. As a result new competition agencies in developing

[29] Despite resource constraints developing country governments can prioritize investment in the education system. Prioritization of education policy is seen as one of the key factors that has led to the speedy technological development and economic growth of some East Asian countries. (The most prominent example is the policies pursued in the Republic of Korea between 1973-90.) Even today East Asian countries are among the highest achievers in world education rankings [see e.g. the results of the comprehensive 2012 PISA Survey of the OECD in 65 participating jurisdictions – available at http://www.oecd.org/pisa/ (accessed on March 02, 2014)].

[30] (UNCTAD, 1999) – Shows that transfer of new technology from advanced transnational companies depends on the technological and absorptive capacity of local companies in developing countries.

countries often depend on financial aid of foreign donors even for acquiring suitable office space and basic office equipment.[31] In addition, the greatest operational challenge for most competition agencies is the recruitment and retention of skilled professionals (e.g. economists and lawyers) especially when private sector salaries greatly exceed public sector compensation scales.[32] Furthermore, miniscule wages of competition agency staff may create temptations to accept bribes in return for relaxing nominal regulatory requirements.[33]

In his research on the efficiency of competition law enforcement across the world, Mateus demonstrated that thirty-eight out of a sample of 101 countries had either no NCA or an NCA with extremely limited resources.[34] The author explained that these countries could hardly be considered to have a real competition law regime. According to Mateus, the rule of thumb is that a competition agency should have about five to seven professionals per 1 million of population.[35] Based on this estimation, one may safely conclude that developing countries generally do not have sufficient resources for effective competition law enforcement.[36]

Several institutional solutions are proposed in the literature to overcome human resource constraints in competition agencies. These include improving the education system (especially in university departments of business administration, economics, law, and public administration)[37], offering competition agency staff training programmes on procedural, methodological and substantive matters, offering internships for staff to gain practical experience, international cooperation in technical issues and exchange of information[38], making the competition agency positions more attractive by offering the staff lifestyle benefits, making the staff's extensive training or further education abroad conditional on compulsory work for a defined period (where

[31] (Kovacic, 1997), pp. 418-9.
[32] (Kovacic & Eversley, 2007), p. 11.
[33] (Kovacic, 2001), pp. 307-8.
[34] (Matheus, 2013), Kindle Edition location: 2545-56 of 7565. The data set used by Mateus was centered on the year 2006 for each examined jurisdiction.
[35] Ibid. The author, however, recognizes that the required number of professional staff might be considerably less (four to five professionals per 1 million people) in countries with high population levels (e.g. 30 to 40 million people) due to economies of scale in enforcement.
[36] According to (Matheus, 2013) '[n]*o country with a GDP per capita below 13,570 USD has a competition authority that is well resourced*.' Ibid.
[37](Kovacic, 2001), p. 313.
[38] Chapter 3 will examine different levels of international cooperation in competition law and enforcement.

noncompliance would require the repayment of all expenses plus a fine), and improving the reputation of competition agencies in the eyes of the public.[39]

Although the proposed solutions would contribute to recruitment and retention of skilled professionals in competition agencies, they are not free of cost. Competition agencies in developing countries might struggle with funding such solutions from the limited resources provided by their governments, and therefore may need to rely on the money and technical assistance of multinational donors and advisory bodies. Contributions of these multinational bodies, however, are usually focussed on short time spans, and in this respect their attention to implementation of new competition laws and policies is unpredictable.[40] Therefore developing countries seek to develop relationships with a wide array of more advanced competition agencies and multinational donors and advisory bodies.[41]

2.1.4 Weak Consumer Groups and Low Awareness of Competition Policy

Legal enforcement would be better and more efficient when the subjects of the law are aware of their rights and responsibilities. Awareness of law would encourage both real and legal persons in self-discipline and assertion of their rights before courts and government agencies.

Although the number of developing countries with their own national competition law regime has proliferated in recent years, core objectives and dynamics of competition law have still not gained wide acknowledgement in their respective societies. Moreover, consumer groups in developing countries are usually not well organised to offer dispersed consumers a platform from which collectively to manage and defend their common interests.

As a result of weak consumer groups and low public awareness of competition law cooperation between the public and competition agencies on competition law matters is often very limited in developing countries. This means detection and inspection of anti-

[39] (Gal, 2009c), pp. 426-7, (Kovacic & Eversley, 2007), p. 11.
[40] (Kovacic, 1997), p. 428. Likewise Gerber observes that multinational advisory bodies, such as the UNCTAD and the ICN, often pay significantly more attention to the establishment of a regional competition law system than its enforcement [(Gerber, 2012) p. 269].
[41](Kovacic, 1997), pp. 437-8.

competitive conduct rests almost solely on competition agencies, which in turn usually lengthen the decision-making process and increase the cost of legal enforcement.

Establishing a relationship between competition agencies and professional associations, such as chambers of commerce and bars, could provide a valuable service in disseminating information on competition law and enforcement practices across firms and consumers.[42]

Section 2.2 Political Governance Aspect

Political influences on competition law enforcement in developing countries will be examined below under four headings: (i) state-owned enterprises, (ii) inappropriate government intervention, (iii) unstable governments and corruption, and (iv) lack of political will to promote efficient competition law enforcement.

2.2.1 State-Owned Enterprises

Today, state-owned enterprises (SOEs) still undertake an important share of the economic activity of developing countries.[43] As discussed in Section 2.1.1 above, low domestic demand and the resulting naturally concentrated market structures in developing countries often require more monitoring by governments, which may prefer to control market dynamics through SOEs rather than observe and regulate the activities of private market players. SOEs, which are usually legal or natural monopolies, however, seem to operate significantly less efficiently than private firms, especially in developing countries.[44]

The reasons for the establishment of strong SOEs in developing countries are multiple. From an historical perspective, the colonial past of some developing countries created a strong desire to achieve greater national control of their economies. As a result, during

[42] Ibid., pp. 410-1.

[43] '*Although the weight of SOEs in economic activity varies from country to country, data collected by the World Bank just over a decade ago suggest that SOEs accounted for close to 20% of the total non-agricultural economic activities in an average low-income developing country. In certain economies that have transited from a formerly state-socialist economic model this share remains above a third.*' (Balbuena, 2014), p. 7.

[44] After an extensive review of the literature on SOEs Shirley and Walsh examine and compare the findings of 52 empirical studies on the performance of SOEs relative to private enterprises, and conclude that the performance of '*private and privatized firms are significantly superior to that of public firms.*' (Shirley & Walsh, 2000), pp. 48-52.

the 1960s and 1970s developing countries nationalised numerous private firms, especially in strategically important sectors of the economy such as petroleum and mining.[45] In this period import substitution became a popular trade policy, and developing countries started to establish regional blocs in order to reduce their economic dependency on industrialised economies.[46] Besides, promotion of regional development was another purpose of SOEs.[47] In addition, during the Cold War period some developing countries embraced socialist ideology, which comfortably accommodated the policy of building strong SOEs.[48]

More generally, the primary reason for building SOEs in developing countries appears to be ensuring capital investment, and in particular investment in infrastructure.[49] Under-development and deficiencies in basic public services such as communication and transport may prevent or reduce the value of certain economic activities in developing countries. Unlike the case in industrialised economies, doing business in developing countries may require additional investment in the physical infrastructure and/or neighbouring goods and services. Moreover, political instability, weak institutions and ill-suited financial mechanisms and legal framework in developing countries may increase uncertainties in business forecasts and therefore discourage FDI. Domestic firms in developing countries, on the other hand, might be short of funds with which to undertake major investment. Against this background SOEs might be beneficial for improving the sectors that private investors find not sufficiently lucrative to do business. Likewise, sectors that are related to public security might justify public management.[50] In this regard, with the hand of an SOE, governments can invest in and control the relevant sectors and secure a reliable supply of goods and/or services. Moreover, SOEs may also serve to achieve distributive objectives. Accordingly, governments may ensure that SOEs provide goods and services that are primarily consumed by the poor (e.g. basic nutrition and health services) at below-cost prices and thereby increase their accessibility.[51] Furthermore, SOEs may be used to bolster labour policies of governments, for example by hiring excess labour input and paying above-

[45] (European Commission, 2003), p. 5.
[46] Three waves of regionalization are examined under Chapter 4 below.
[47] (D. A. C. Smith & Trebilcock, 2001), pp. 218-9.
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] (Kowalski, Büge, Sztajerowska, & Egeland, 2013), pp. 11-3.

market wages.[52] In small island states and microstates, in particular, government might be the largest employer, and government revenue and spending might be the main drivers of the economy.[53]

In light of the above a key problem concerning SOEs is suggested to be the pursuance of multiple, ambitious and conflicting objectives.[54] Unlike privately owned businesses, SOEs may be operated with an objective of achieving not only economic efficiency and profitability but also certain social and political goals of the respective governments.[55] As mentioned above, these goals may concern, among other things, reducing inequalities in wealth distribution or promotion of employment. Moreover, depending on the level of political capture and deficiencies in the legal system of a country, SOEs might be used to strengthen the power and connections of high-ranking state servants or politicians.[56] Pursuance of multiple objectives, however, would be likely to require some sacrifices from economic efficiency of SOEs.

SOEs in developing countries usually face problems of capacity and financial resources. Lack of skilled personnel, inability to afford the newest technologies, and inadequate funding are among the reasons that lead to lower efficiency of SOEs in developing countries.[57]

More generally, SOEs in developing countries and elsewhere tend to operate less efficiently for two reasons: (i) lack of incentive for good internal management, and (ii) lack of competition in the relevant markets. SOEs are usually sought in sectors where market competition is weak. Concessions granted to SOEs usually further reduce market competition and tend to create state-owned natural or legal monopolies. Absence of competition, on the other hand, diminishes incentives to improve the efficiency of production. From the perspective of efficient management, the literature has shown that managers of SOEs in developing countries are often not given enough autonomy and

[52] (Shirley & Walsh, 2000), p. 26.
[53](Asian Development Bank, 2012), p. 1.
[54] (Nellis, 2005), pp. 19-22.
[55] (Shirley & Walsh, 2000), p. 7.
[56] (Nellis, 2005) observes that '[m]*any African (and European, Asian and Latin American) politicians and public officials have reaped material and prestige benefits from SOEs, in the form of loans, gifts, transport, housing, board membership, future jobs for themselves, present jobs for friends, relatives and supporters, procurement kick-backs, and much else*' (ibid., p. 21). This problem could be particularly acute in small island states and microstates. For example, in a recent review of the SOEs in Kiribati and Tuvalu the ADB demonstrated the decisive role of having extended family ties to the responsible minister for appointments to directorships in SOEs. It is noted that this made redundancy of incompetent officers de facto impossible. See, (Asian Development Bank, 2012), pp. 1-2.
[57](European Commission, 2003), pp. 6-7.

resources to lead.[58] Likewise, schemes for rewarding achievement and punishing mistakes, which would have helped to improve incentives for good management, are also very rare in most SOEs, particularly in those of developing countries.[59] Combined with often-cumbersome redundancy procedures of SOEs, developing country SOEs usually operate with high x-inefficiencies.

Although inefficient operation of SOEs in developing countries is largely acknowledged in the literature, so far there is no consensus on the right path to their reform. Privatisation has been the traditional response for the removal of inefficient SOEs. In developing countries, however, a successful privatisation might not be possible due to broader problems in the political and economic environment, such as unstable government, frequently amended and conflicting trade policies, inadequate legal framework and institutional structure, corruption, and perhaps most importantly, an under-developed private sector.[60] Other reform proposals include (i) making the internal operation rules of SOEs more commercially orientated and ensuring greater transparency in decision-making; (ii) where possible, promoting competition of SOEs with private firms (e.g. by price liberalisation, removal of barriers to market entry); (iii) establishing public private partnerships (PPPs) for transferring operational control of SOEs to private providers while maintaining ownership in public hands; (iv) mutualisation (where assets are owned by a non-profit company funded by bond issues rather than shares, and any profit is then reinvested in the company which could allow pursuance of public interest objectives besides commercial objectives).[61] So far it is difficult to comment on the relative success of these proposed solutions as further testing and research is required.[62] Nevertheless, any reform of SOEs in developing countries is likely to require an extensive economic and legal planning, as well as strong political vision and dedication.

2.2.2 Inappropriate Government Intervention

Open markets and free competition do not always guarantee significant economic returns from improved efficiencies. When the level of competition in markets is low and

[58](Nellis, 2005), pp. 21-2.
[59] Ibid.
[60] (D. A. C. Smith & Trebilcock, 2001), pp. 217-8.
[61] (European Commission, 2003), pp. 6-7.
[62] Ibid.

economic activity is hindered by factors such as poor physical infrastructure, small size of the economy and geographical remoteness, governmental intervention might be necessary in order to correct market failure.[63] For instance, market liberalisation would normally enable firms that suffer from limited domestic demand to produce at efficient levels by raising exportation. However, when domestic firms of a developing country cannot make the necessary initial investment in exportation due to information asymmetries in the condition of export markets (unlike TNCs, these domestic firms may not be informed about consumer preferences in markets abroad, and costs and profitability of exportation), a government initiative for training firms and providing information might help domestic firms to overcome this initial difficulty of expanding to markets abroad, and contribute to long-term economic development in the respective country.[64] Likewise, when limited financial resources are the primary obstacles to exportation by domestic firms in a developing country, a policy intervention ensuring the availability of long-term credit to private businesses might prove beneficial.[65]

Government intervention in the economy often takes the form of subsidies, state aid or tolerance of cartels and monopolies.[66] Likewise, developing country governments may focus on achieving industrialisation through SOEs or by granting exclusive privileges to domestic companies (such as offering procurement preferences, introducing public restraints on market entry and FDIs, and granting exclusive rights for provision of certain goods and services).[67] Another common industrial policy consideration of developing countries is embracing weak patent protection regimes for disseminating new technologies within their borders.[68] Developing country governments may also consider social objectives such as promotion of employment (see the previous sub-section on SOEs) or protection of certain social groups (e.g. special treatment for the historically disadvantaged population in South African competition law) in their economic interventions.

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[63](B. Hoekman & Javorcik, 2004) – the paper includes a review of previous empirical studies on the economic effect of government intervention in the process of economic liberalization.
[64] Ibid., p. 462.
[65] Ibid., pp. 470-1.
[66] Examples of certain interventions can also be found in developed countries' competition legislation. For example, export cartels, which have no influence on domestic markets, are legal or tolerated in most jurisdictions. [See, (Martyniszyn, 2012), pp. 183-4.] Likewise, in Germany, the Act Against Restraints on Competition (GWB) includes a special provision on 'rationalisation cartels' and 'structural crisis cartels' aiming to protect local German industries.
[67] See also, (Maskus & Lahouel, 2000), pp. 598-9
[68] Ibid., p. 596. However, the use of new technologies depends on the absorptive capacity of recipient country businesses.

In sum developing countries may interfere to '*free markets*' in order to address market failures, to '*accelerate*' industrialisation and to achieve social objectives.[69] Yet such interference may limit competition, avoid the desirable elimination of inefficient firms from markets and thereby hinder sustainable economic development. Governments need to calculate the potential welfare implications of any policy intervention that they may consider, and to ensure that the benefits will outweigh the costs of adjustment.[70] This would, however, require governments equipped with necessary technical skills and market observation capacity, as well as the right political motive. Transparency and accountability are critical to good governance. The absence of transparent administrative procedures, as well as public and legal scrutiny of policy decisions, may make it easier to exercise discretion and to use policy intervention as a tool for rent-seeking and inducing personal benefits.[71] Moreover, in developing countries that suffer from unstable governments, bad corporate governance, corruption, a large informal economy and/or lack of resources, assessment of the long-term effects of a policy intervention might not be easily achievable. Besides, pro-markets economic policy intervention may receive opposition from dominant private and public enterprises, particularly from SOEs and government institutions that oversee SOEs, which might not be willing to lose their significant economic leverage in the respective domestic economies.[72]

2.2.3 Political Instability and Corruption

Another key difficulty concerning economic growth and promoting market competition in developing countries is unstable governments and the resultant volatile economic policies.

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[69] For a detailed account of political influences on competition law enforcement and the ways to address their adverse effects, see (Gal, 2002b).

[70](B. Hoekman & Javorcik, 2004), p. 458. As a general note, however, the authors indicate that '[government interventions] *are second order relative to ensuring a stable macro-economic environment and an institutional infrastructure that supports the functioning of modern markets in general*.' Likewise, (Rodrik, 2013) explains that '*Without some semblance of macroeconomic stability and property rights protection, new industries cannot emerge.* (…) [However] *fostering new industries often requires second-best, unconventional policies that are in tension with fundamentals. When successful, heterodox policies work precisely because they compensate for weaknesses in those fundamentals*' (ibid., p. 5, see also pp. 29-35).

[71](Kovacic, 2001), pp. 271-2.

[72](Kovacic, 1997), pp. 421-2.

There are plenty of econometric studies that examine the relationship between unstable governments and economic development. Although the factors considered in assessing the *instability* of governments varies across the respective studies, there seems to be a broad consensus on the negative influence of political instability (including government change and other factors that lead to exorbitant changes in political tendencies) on economic growth.[73] This adverse influence may partly be explained by dramatic economic policy amendments that often follow government replacements. When political instability leads to extreme economic policy change it is likely to have a cost on the credibility of the investment environment in the respective country for private investors. Depending on historical and contemporary political tendencies within a (developing) country, instability of government may trigger private investors' fears of facing expropriation, significant market access restrictions or other kinds of *extreme* measure, and thereby losing the value of their investments. In addition, unstable government and resultant volatile economic policies may obstruct the continuance of previously scheduled large investments in public services such as infrastructural improvements, when a newly appointed government decides its public policy priorities differently. The inability of governments to pursue long-term projects may also disrupt economic development, and discourage private investment.[74]

Reluctance of private investors to establish their businesses in an instable political environment may clearly result in reduced competition in domestic markets of the respective economy.[75]

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[73] (Aisen & Veiga, 2013) – After a literature review the authors note that their own findings are '*strikingly conclusive: in line with the results previously documented, political instability reduces GDP growth rates significantly*' (ibid., p. 153 – emphasis added).

[74] In addition, political instability is found adversely to affect growth by reducing the rate of physical and human accumulation. This is because accumulation normally takes place after a level of development in economic activity. See, ibid., pp. 162-6.

[75] Another relevant and widely discussed topic regarding economic development and political stability is the effect of embracing a democratic regime. The literature, however, is divided on the influence of democracy [(Gurgul & Lach, 2013), pp. 190-1]. For example, after conducting an extensive review of economic history of various countries across the world, (Acemoglu & Robinson, 2012) make a very strong case for the necessity of democracy to a sustainable economic development (especially after reaching a certain economic advancement level). By contrast, (Gerring, Bond, Barndt, & Moreno, 2005) state that '*the econometric evidence from the literature suggests* […] *that the net effect of democracy on growth performance cross-nationally over the last five decades is negative or null*' (ibid., p. 323). See also, (Aisen & Veiga, 2013) who also reach to a similar conclusion. In this regard, according to Posner '[i]*n general, (...) the simpler the economy (...), the more adaptive a dictatorial political system; the more complex the economy, the more adaptive democracy is. (...) Dictatorship will often* [be] *optimal for very poor countries. Such countries tend not only to have simple economies but also to lack the cultural and institutional preconditions to democracy. Dictatorship is much less likely to be optimal for advanced economies. This pattern seems to be broadly observed*' [see (Postner, 2010)].

Similarly, corruption of politicians or government officers may prevent enactment of adequate laws and policies, as well as legal enforcement, in any policy areas, and competition law/policy is no exception. The *2013 Corruption Perceptions Index,* which measures the perceived level of public sector corruption in 177 countries, demonstrates that the corruption problem is far more severe among developing countries.[76] As Kovacic (2001) explains, '[i]*n countries with a deep-seated culture of rent-seeking and weak or corrupt systems of public administration, well-established political and economic interests may readily subvert the competition policy system to protect the existing distribution of wealth and privilege in society.*'[77]

In addition, business lobbies and other vested interest groups are often very strong in most developing countries, and this might set back competition law enforcement.[78] For example, the presence of strong vested interest groups was suggested to be among the main reasons for inactivity of NCAs, especially in controversial and difficult cases, in India and Sri Lanka.[79]

2.2.4 Lack of Political Will

Socio-economic dynamics and political environment may hinder the emergence and evolution of efficient competition law enforcement in a developing country. Competition law and policy has to be recognised to operate within the context of a broader palette of social and economic policy arrangements with the aim ultimately of serving a higher public policy objective. Accordingly, socio-economic dynamics and political priorities of governments may require compromises in the *core* purposes of competition policy which are often seen as promoting and protecting the competitive process and attaining greater economic efficiency.[80] Accordingly, perception of the role

[76] See, (Transparency International, 2013). Likewise, (World Bank, 2013) report confirms that the lower the income level of a country, the weaker is its control of corruption.
[77] (Kovacic, 2001), p. 288. A level of corruption, however, is suggested to be beneficial to economic growth. See (Méndez & Sepúlveda, 2006) – The latter paper examines data collected from over 100 *free* countries (i.e. countries in which people enjoy a defined degree of political rights and civil liberties). Méndez and Sepúlveda find that in the long run growth maximization occurs at a corruption level that is *'significantly greater than zero'*.
[78] The stronger position of vested interest groups in developing countries may be explained, in part, by the existence of often very close personal ties between business and political elites.
[79] (CUTS, 2003), p. 69.
[80] OECD's findings on the perception of the *core* competition policy objectives by various OECD and non-OECD countries confirm the above statement. See (OECD, 2003a), pp. 9-10.

of competition law and policy by developing country governments is vital to an effective administration and enforcement.

As mentioned earlier, competition law enforcement is at a fairly primitive stage in many developing countries. While a great number of developing countries have already adopted a national competition law regime, and few are in the process of doing so (e.g. Ghana, Nigeria), the respective laws are often implemented only to a limited degree or completely disregarded. A key reason for weak implementation is low priority of competition policy as compared with more pressing development needs (such as ensuring access to basic nutrients and clean water) faced by poorer developing countries.[81] In least developed countries and microstates, in particular, a national competition law regime may not be economically feasible.[82] Another reason might concern lack of experience and technical skills in conducting complex competition law analysis. As a result competition agencies in developing countries may refrain from handing cases that require complex economic judgment.[83] In addition, when the socio-economic culture in a developing country strives to gain control of the national economy through *excessive* government intervention or the drive of strong SOEs, responsible ministries, agencies and courts may design and interpret competition rules in such a way as to accommodate this prevailing socio-economic culture. Gal provides a striking example of the transformational role of the socio-economic perspectives on enforcement of competition law in Israel. She demonstrates that changes to the economic policies embraced by the Israeli government produced parallel changes in the interpretation of competition law by Israeli competition agencies.[84] Gal explains that in the 1960s and 1970s when the Israeli government pursued more protectionist policies aimed at strengthening domestic firms and encouraging exportation, competition agencies were more tolerant of market restrictions which were found to be necessary to

[81](Papadopoulos, 2010), p. 254.
[82] When resource restrictions objectively prevent emergence of a workable national competition law regime respective countries may be obliged to search for alternative institutional solutions, such as combining competition law enforcement with the management of certain regulated services under the roof of a single authority, or embracing a regional competition law enforcement system. Under both options, however, the authorized body may find itself in the struggle of balancing conflicting objectives of different policy areas and as a result its decisions might be seen as having significant political conclusions. Therefore coherence between combined policy areas must be observed. Besides, when a single institution is authorized to safeguard multiple policies, depending on the breadth and diversity of its duties, it may become a more elusive target for any single vested interest group. In this regard, having regulatory authority over a broad array of industries and firms might serve as a protective shield against capture. See, (Kovacic & Hyman, 2012), p. 533.
[83] (APEC, 1999), p. 8 - § 2.9.16.
[84] (Gal, 2004), pp. 23-6.

increasing exports. According to the author, from the mid-1980s the Israeli government changed its economic orientation towards a more free-market policy and as a result competition agencies began to attach more weight to competitive considerations and applied long-term, dynamic economic analysis.[85]

Economic priorities and public policy objectives pursued by governments may also be reflected in the attachment of different goals to competition policy and law. As will be seen in Section 2.3.1 below, consideration of broader public policy objectives, such as promotion of employment, improvement of access to basic services or protection of certain social groups in competition law review is common in developing countries.

Although political will and ability to establish a workable competition law enforcement system might be fairly limited especially in less developed countries, a well-planned competition advocacy campaign may make a significant difference in the way competition law and policy is understood by politicians, businesses, media reporters, and consumers. Likewise, legal and institutional reform that increase transparency in administrative procedures may restrict the scope for discretionary action of public officers and reduce the influence of vested interest groups. Accordingly, reduced gains from private lobbies and privately motivated government intervention may, in part, remove the disincentives for competition law enforcement. Likewise, international cooperation on competition law enforcement, and in this context opening domestic competition law practices to the scrutiny of multinational advisory bodies in addition to domestic and international consumer groups may help eliminating ill-purposed political obstacles.

Section 2.3 Legal Environment

Carefully designed competition legislation and a well-functioning judiciary can play a significant role in protection of competition in the marketplace and encouragement of private investment. In developing countries, however, domestic law and institutional arrangements are often not well suited to securing the emergence of an effective competition law regime. Legal environment issues that may restrict or prevent the success of competition law enforcement in developing countries will be examined below under two broad headings: inadequacy of law and institutional challenges.

[85] Ibid.

2.3.1 Inadequacy of Law

As a general rule, law needs to be designed to reflect economic and political realities of any given jurisdiction. In accordance with this purpose, pressing development needs of a developing country may result in pursuance of unconventional goals in competition legislation. These unconventional goals may concern economic or non-economic public policy objectives. In some developing countries inclusion of non-efficiency based policy goals, no matter how distant from actual operation of markets and competitiveness, might be a precondition of obtaining the necessary political support for the establishment of a domestic competition law regime.[86]

Competition policy is expected to contribute to economic development in most developing countries. Thus subordination of competition law enforcement to other economic policies, such as trade or foreign investment policies, which are believed to be more conducive to economic development, is deemed to be justifiable.[87] Explicit reference to one or more of the following goals are found in domestic competition laws of some developing countries: protection of consumers (India, Tanzania, Zambia, Peru), ensuring freedom of trade (Zambia, India), regulation of internal trade (Sri Lanka), protection of labour (South Africa), protection of SMEs[88] (South Africa), expansion of entrepreneurship base (Zambia, Malawi and Zimbabwe) and the promotion of the ownership of particular racial or ethnic groups (South Africa).[89]

Even in the absence of specific reference to broader public policy goals in competition legislation, such goals might de facto be considered in the judgments of competition law

[86] (Hyman & Kovacic, 2013b), p. 2167. The authors note that South Africa could not have established a new competition law regime in 1990s if the enhancement of economic opportunities for non-white population was not among the goals of the new law. However, so far the respective goal has played only a very limited role in practice.
[87] (Fels & Ng, 2013), Kindle Edition, location 3639 of 7565.
[88] Protection of SMEs is often considered to be crucial to economic growth in developing countries for several reasons. Firstly, SMEs tend to be widely disseminated in developing countries, as a result of which they operate as important vehicles for increasing employment opportunities at relatively low capital cost. Secondly, through geographically far reaching employment opportunities SMEs may serve to ensure more equitable income distribution among the population. Thirdly, increased employment via SMEs may help dissemination of management and technical skills across the population. SMEs may improve technical capacity of developing countries related to adoption and/or development of new and better technologies. Fourthly, SMEs with their broad geographical reach, are ascribed a further role of socially, economically and geographically linking diverse sectors of the economy. Lastly, SMEs may strengthen market competition in developing country markets, by subcontracting and being ancillary to large-scale enterprises. See, (G. K. Lipimile, 2004), p. 182.
[89] Compiled from (CUTS, 2003), p. 98; (G. K. Lipimile, 2004), p. 181 and; (Boza, 2003).

enforcement bodies.[90] The legal ground of such judgments might be found in the difficulty of establishing precise and definite methods for assessing the core competition policy objectives such as promoting economic efficiency and consumer welfare.

Although pursuance of broader public policy goals in competition law enforcement might present itself as an economic or political necessity, too widely defined goals may become problematic to enforce for at least four reasons. Firstly, they may create a wrong impression of what competition law and policy is able to achieve. For example, a competition agency might not be authorised directly to interfere in price increases, even though it might be under pressure to set price limits for dominant firms due to the previous experience of central planning in a transition economy.[91]

Secondly, broadly defined rules might politicise the decisions of competition agencies or courts when they require balancing competing economic policies, or economic and non-economic policies.[92] For instance, a competition agency might be required to assess the possible long-term benefits of improved export capacity against the immediate negative effect of increased concentration. Besides being politically delicate, such balancing exercises might require comparison of unquantifiable policy outcomes. Such a difficult case might be a merger in a developing country, which leads to job losses while at the same time creating a national champion with an ability to compete in international markets. When balancing competing public policies is left to the broad discretion of a competition agency the agency may become vulnerable to the opposition of political groups as well as private businesses.

Thirdly, attachment of various public policy goals to competition law may pave the way for government intervention in markets. As set forth in Section 2.2.2 above, a level of government intervention is widely accepted as necessary, in particular in developing countries, in order to remedy market failure. Finding the right balance between competing public policies, however, is an elusive goal for all governments. When government intervention is exercised through competition law enforcement, different

[90] Such interventions might be explained by the reflection of socio-economic ideology rooted in the entire administrative governance structure of a country. On this, see the Israeli example in Section 2.2.4 above.
[91](Kovacic, 1997), pp. 423-4.
[92] A major criticism is the absence of 'workable legal standards' for balancing economic and non-economic public policies see, (Areeda & Turner, 1978), para. 105. By contrast, Townley suggests that the difficulty of balancing non-economic objectives should not automatically render such practices unjustifiable. Moreover, he rightfully argues that courts regularly make political decisions of similar nature [see (Townley, 2009), pp. 38-9].

opinions on the required level of intervention may remove the debate on competition policy from promotion of economic efficiency, which is often considered to be the core objective of market competition. This would also affect the reputation of institutions undertaking competition law enforcement in the eyes of other government institutions, businesses and consumers.

Lastly, since broadly defined competition policy goals complicate competition law analysis, they may harm legal certainty and predictability of decisions, which may in turn undermine investment. In order to alleviate the abovementioned policy deficits, states could be advised to clarify the goals of their competition law and decide on the procedures that will be followed for the pursuance of the respective goals in actual case reviews to the extent that it is possible.

Competition law protection in developing countries may also be restricted by limited scope of substantive laws. Due to political concerns or resource constrains certain potentially anticompetitive conduct might be kept outside the scope of competition legislation. For example, some developing countries delay merger control due to the high workload and expense merger review may create.[93] Moreover, special exceptions and exclusions from competition law enforcement might be granted to certain business groups, enterprises or industrial sectors for public policy reasons. In practice the following activities or business groups are found to be exempted or excluded from the application of competition law in some developing countries: (i) export cartels[94] (India, South Africa, Pakistan), (ii) exercise of intellectual property rights (South Africa, Zambia), (iii) operation of professional associations (Zambia, South Africa, Tanzania, Kenya), (iv) activities promoting SMEs, collective bargaining of labourers and/or

[93] For example, the national competition law of Senegal does not include merger control provisions. However, being a member of the WAEMU, Senegal is subject to merger laws of the WAEMU. In line with the requirements of the WAEMU laws Senegal is currently working on a draft reform bill concerning merger control. See, (Diallo, 2014). Another reason for exclusion of merger control provisions from competition legislation of some developing countries might be the proneness of merger control to political influence.

[94] Exemption of export cartels from competition law enforcement might be justifiable in developing countries mainly on two grounds. Firstly, export cartels might be a necessary requirement to ensuring exports by developing country firms which are, due to the smaller size of their home markets, often at a competitive disadvantage relative to TNCs. Usually exports are permitted to countries conditional on exporter firms' additional investment into the recipient economy. Firms from developing countries might be able to meet such minimum investment requirements only when they are allowed to combine their resources. In such cases, export cartels might be beneficial in enabling the inclusion of developing country firms in the global trade mechanism. Secondly, export cartels among developing country firms might be less detrimental than those among developed country firms due to relatively higher buyer power of importers from developed countries. See, (Stewart, 2004a). [Steward therefore suggests that export cartels should be legitimate only in developing countries. For a similar conclusion see (Adhikari, 2004).]

particular racial or ethnic groups (South Africa), and (v) economic activities in certain vulnerable sectors (Tanzania, India, Zambia).[95] Besides, competition law of developing countries (such as India, Zambia, and Thailand) may include a *draw-back provision* which enables the government to exempt *any* businesses or groups of enterprises from competition law enforcement.[96]

An additional problem that usually affects the effectiveness of competition law enforcement in developing countries is the absence of clearly stated investigation and decision-making procedure and authorisation for collection of data required for competition analysis.[97] Enactment of clearly defined rules on the authority of competition agencies and courts is crucial to healthy market analysis, especially when limitations on readily available market data due to a large informal economy in most developing countries is considered. Competition law enforcement officers should be given the authority to collect evidence from business premises, to have access to commercially sensitive information, to interview employees and managers and to obtain the opinion of rival firms, civil society organisations and customers during investigation.[98]

Lastly, as will be examined in the next Chapter in more detail, vaguely defined competition provisions, dysfunctional institutions, incoherent procedural stages, and long time periods required for decision-making are among the primary reasons for limited international cooperation between developed and developing countries during actual competition law investigation and case review.

2.3.2 Institutional Challenges

Institutional design is one of the key factors that determine the workability and effectiveness of any competition law regime. The right institutional design needs to be tailored in coherence with legal endowment and administrative traditions of any given jurisdiction. There are mainly two alternative systems concerning institutional designs: (a) judicial system (i.e. enforcement of competition law by generalist or specialised courts) and, (b) administrative system (i.e. enforcement of competition law by an

[95] (CUTS, 2003), pp. 133-4.
[96] Ibid.; (Nkikomborirak, 2004).
[97](Kovacic, 2001), pp. 308-9.
[98] Ibid.

autonomous competition agency, decisions of which should be open to appeal to courts and/or a specialist tribunal).

A vital challenge for developing countries that embrace a judicial system for competition law enforcement is to overcome the insufficient technical knowledge of courts. Judges (and juries) in developing countries are usually neither trained to examine competition law cases, nor experienced in assessing econometric evidence. Although training and foreign assistance is often indispensable to overcoming this difficulty advanced skills are more likely to be developed over time by enforcement experience.

Enhancing knowledge and technical skills of judges, however, might not be sufficient for the effectiveness of competition law enforcement. For establishing a reliable competition law regime, developing countries need to ensure independence of the judiciary and transparency in legal procedures. When the existing judicial system of a developing country is hindered by political interference and deep-rooted corruption, establishment of an autonomous administrative body for competition law enforcement might be more preferable than reforming the entire judiciary. Likewise, pre-existing excessive workload of the judiciary, its inefficient operation and long delays in judicial decision-making may also create a tendency towards establishing independently operating administrative institutions.[99]

In developing countries that embrace the administrative system for competition law enforcement, the level of autonomy of competition agency from government influence varies across jurisdictions. At one extreme competition agencies may constitute an integrally bound and directly controlled unit of a relevant ministry (e.g. China), while at the other extreme competition agencies might to a very large degree be independent in their day-to-day operations and decision-making. The following are determining factors of the level of autonomy of a competition agency: (i) the mechanism that determines the agency's budget; (ii) procedure for appointment, tenure and removal of the agency's board and key employees; (iii) compulsory procedures that the agency has to comply

[99] The above-mentioned problem of lack of judges trained in competition law and economics would also affect the competition analysis in appeal review of decisions by autonomous competition agencies. For example, in Chile competition law cases are decided by an administrative institution in the first instance, and appeals from first instance decisions are made to a specialised court. According to a recent ICN survey, despite being a court specialised in competition law, the Appeal Court in Chile lacks familiarity with economic concepts involved in competition analysis to an extent which may cause some distortion of competition policy. See, (ICN, 2007a), p. 17.

with in initiating an investigation, and in decision-making; and (iv) accountability[100] of the agency's decisions. Competition agencies that are under the control of a ministry are usually more prone to intervention guided by the short-term political or private interest of politicians. A degree of independence from political influence in day-to-day operations, however, is vital to observation of market principles in the decisions of a competition agency.

In most jurisdictions the authority of competition agencies includes a degree of autonomy in determination of enforcement priorities and internal working procedures. In addition, most competition agencies are authorised to develop secondary laws and technical regulations as well as policy recommendations for clarification of the primary competition legislation. Due to these competences, adjustments to competition policy might be made faster and more efficiently under an administrative system than adjudicative system (the latter of which may well require the involvement of the legislature - in parliamentary systems, the parliament). For the same reasons, an autonomous competition agency might be able to decide on the skills-set required from new staff, and impose measures to ensure procedural fairness and transparency. Moreover, competition agencies, unlike courts, may organise competition advocacy campaigns for raising public awareness of competition and strengthening their autonomy from political interference. Independent from the distinction between administrative and judiciary institutions, lack of human and financial resources constitute another drawback to the operations of competition law enforcement bodies in most developing countries. Poor resources may hinder not only enforcement capability of an institution, but also negatively influence its reputation in the eyes of businesses, other public institutions and consumers.

[100] Measures taken to ensure accountability of a competition authority may at times limit the authority's autonomy. Accountability is often established by giving the government or legislature direct control over the agency's budget. It may also be ensured by obliging the competition authority to publish or in other ways disclose its activities and operations, and to respond to queries of the public. In all legal systems a tension can be observed between the measures taken to ensure the accountability and autonomy of administrative bodies. Accordingly, complete freedom from political interference may diminish accountability and effectiveness of a competition agency. By contrast, however, too detailed procedures for ensuring accountability may be time-consuming, ineffective and expensive. Nevertheless, depending on the degree and the success of advocacy activities of a competition authority, its competence often remains vulnerable to significant amendments to the competition policy by the government or legislator. On the nexus between accountability and autonomy, see (Kovacic, 2011), pp. 291-308.

The literature suggests several remedies for improving institutional difficulties faced by developing countries.[101] The creation of a competition culture through advocacy, improving transparency of administrative procedures by publishing comprehensive guidelines, embedding competition law and economics in university training programmes, creating a collective institutional memory[102], improving international cooperation by establishing close ties with international advisory bodies and other competition authorities, and training the judiciary are among the measures that may help increasing the accuracy and efficiency of competition law enforcement in developing countries.

Section 2.4 Comments and Conclusions

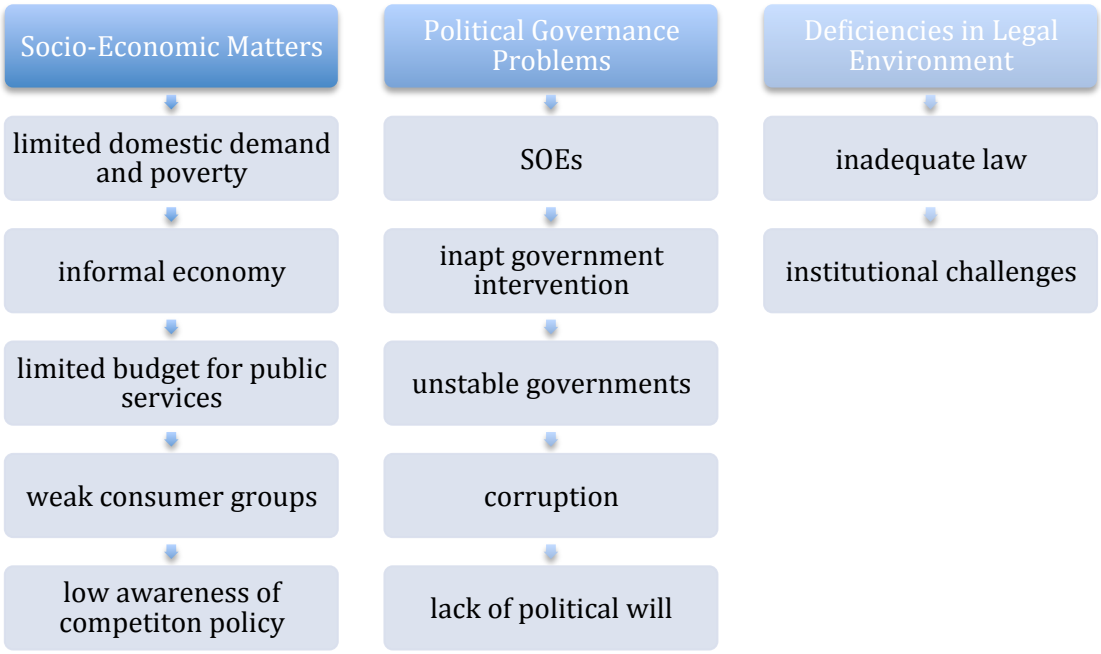
This chapter has examined major obstacles to emergence of an effective competition law regime in developing countries under three categories: socio-economic matters, political governance-related problems, and deficiencies in legal environment.

A noteworthy aspect of the above-listed problematic areas is their vertically and horizontally intertwined operation. Not only are all identified points in each category connected and mutually deteriorating, but also adverse effects may arise from the interplay of the three main categories. For example, a dysfunctional legal system may fail to punish corruption and undue political interference in markets. The resultant market failure can in turn harm the economy and increase poverty of consumers.

Secondly, the above analysis proves that an important part of the competition policy-related problems of developing countries actually stem from low development level and poor political governance. As a result reforms in competition law and policy alone are very unlikely to lead to a significant improvement of competition law enforcement in developing countries.

[101] Among others, (Kovacic, 1997; Kovacic, 2001), (Gal, 2009c), (Matheus, 2013).

[102] Collective institutional memory could be formed by ensuring that the institutional know-how is not totally dependent on specific people but rather accumulated at the competition authority [see (Gal, 2009c), p. 427]. In this regard, organization-wide training and regularly updated manuals concerning the relevant law, regulations, organizational data, policy statements and operational protocols may help creation of an institutional knowledge [(Kovacic, 1997), p. 437].



Lastly, although the literature and the experience of industrialised countries suggest various possibilities for the improvement of the above problems, any wide-ranging reform will inevitably require financial, technical and human resources, and even more importantly, a high level of political motivation. Resource constraints might partly be overcome by external assistance. In the absence of political will, however, no action plan to achieve significant improvements can be implemented. Political motivation of governments, on the other hand, is receptive of complex economic, social and political dynamics formed both within and outside the respective territories.

The rest of this thesis will focus on regional competition law arrangements. The next chapter will first examine different kinds of regional competition agreements, and illustrate the distinctive features of regionally integrated competition law enforcement systems found in deep RTAs. It will then provide a comparative analysis of potential costs and benefits of regional cooperation under all kinds of regional competition agreements. The chapter will conclude with a discussion on whether a regionally integrated competition law enforcement system developed within the broader palette of economic (and social) policy arrangements under a deep RTA can adequately address the above-mentioned common competition law and policy challenges faced by developing countries.

CHAPTER 3 EXAMINATION OF REGIONAL COMPETITION AGREEMENTS FROM THE PERSPECTIVE OF DEVELOPING COUNTRIES

Introduction

The previous chapters have shown that competition law enforcement in many developing countries is weak due to various economic and non-economic drawbacks, such as small economy, financial restraints, lack of skilled workers, poor basic infrastructure, weak governance, dysfunctional institutions, incoherent public policies and low competition awareness. Regional cooperation in competition law enforcement might be useful in reducing the adverse effects of some of these drawbacks, and improving competition law protection.

This chapter will provide an overview of a variety of regional cooperation mechanisms on competition law enforcement, and assess the suitability of regional competition agreements to addressing the difficulties faced by developing countries in competition law enforcement. For this purpose the chapter will first introduce different types of regional competition agreements without limiting itself to agreements concluded between developing countries *(Section 3.1)*. Regional competition agreements will be examined using two taxonomies. The first taxonomy will be based on the legal instruments regional competition agreements employ. The second taxonomy will be based on the depth of regional cooperation that the agreements envisage.

The existence of different legal instruments and levels of cooperation implies that not all regional competition agreements pursue the same goals. A primary distinction will be made between '*regional cooperation agreements*' (agreements which aim solely to achieve inter-agency cooperation for the inspection and deterrence of anti-competitive actions within a region), and '*regionally integrated competition law enforcement systems in deep RTAs*' [agreements aimed, in addition, at facilitating regional cooperation in competition law enforcement, and strengthening the broader economic (and social) integration between the parties].

Secondly, this chapter will conduct a comparative review of potential benefits and costs of different types of regional competition agreement mainly from the perspective of developing countries (*Section 3.2*). This review will demonstrate that the positive

outcomes of a fully functional regionally integrated competition law enforcement system can, in theory, be far more significant than those of a mere regional cooperation agreement. However, the main determinants of the efficacy of all regional competition agreements will be found to be (a) the presence of sufficient political will for the enforcement of the agreement, (b) coherence in the domestic legislation of the parties, and (c) adequate resources and legal enforcement capacity in all jurisdictions.

The chapter will then focus on competition law enforcement problems of developing countries and discuss whether regional competition agreements can help to remedy these problems (*Section 3.3*). After recognising the relatively superior but hard to obtain benefits of a regionally integrated competition law enforcement system under a deep RTA than other regional competition agreements, the chapter will demonstrate the intrinsic link between the regionally integrated competition law enforcement systems and the broader economic (and social) integration plan under a deep RTA. The research will suggest that the success of a regionally integrated competition law enforcement system under a deep RTA is dependent on the workability of the broader regional economic (and social) integration scheme under the same deep RTA.

The chapter will then conclude with a brief summary of findings (*Section 3.4*).

Section 3.1 Introduction to Regional Competition Agreements and the Two Taxonomies

As mentioned earlier, despite the speedy globalisation of trade and the increase in international anti-competitive activities, so far there is no international convention on competition law. International cooperation in competition policy is carried out mainly under the auspices of a few specialised multinational organisations such as the ICN, UNCTAD and OECD. Since international collaboration is indispensable to obtaining evidence and implementing effective sanctions against transnational anti-competitive conduct, the last few decades have seen a rapid increase in the number of smaller-scaled (bilateral or multilateral) competition agreements.

International cooperation in competition law enforcement most frequently takes place via unofficial correspondence between the competition enforcement officers of independent jurisdictions. Even in the presence of a regional competition agreement, however, realisation of cooperation often depends on the development of a professional

relationship and mutual trust between the competition enforcement officers of the parties. The ICN and similar multinational platforms play a complementary role to regional competition agreements by offering competition enforcement officers a forum for discussion and cooperation. Despite their relevance, soft cooperation mechanisms facilitated by multinational institutions remain outside the scope of this chapter, as the scope of cooperation under these arrangements is often less ambitious and primarily aimed at legal harmonisation rather than cooperation in actual law enforcement. Accordingly, the focus of the following sections is on regional cooperation on the basis of bilateral or multilateral competition agreements.

Notably, all types of regional competition agreement include the same basic techniques for facilitating regional cooperation in competition law enforcement. The cooperation mechanisms suggested in an OECD recommendations paper (first published in 1967, and most recently revised in 1995)[1] are embraced by most of the existing regional competition agreement.[2] According to the OECD's recommendations, cooperation under regional competition agreements may mainly revolve around (i) notification of certain activities (as a trigger to cooperation), (ii) exchange of information, (iii) coordination of action, and (iv) consultation and conciliation between the NCAs of independent jurisdictions.

Information exchange is the main facilitator of inter-jurisdictional cooperation under any regional competition agreement. Accordingly, the frequency and the content of information exchanged between the parties are the primary determinants of the actual depth and efficiency of regional cooperation in competition law enforcement. With regard to information exchange, the benefit one party gets from the regional cooperation depends on the presence of evidence required for its competition analysis to be located in the territory of the other signatory parties. Therefore the bigger the trade between the parties of an agreement the more likely that the NCAs of the parties will require evidence available in one another's territory. Consequently, the level of trade between two jurisdictions is often an important determinant of the depth of cooperation in information exchange between the parties.

[1] (OECD, 1995).

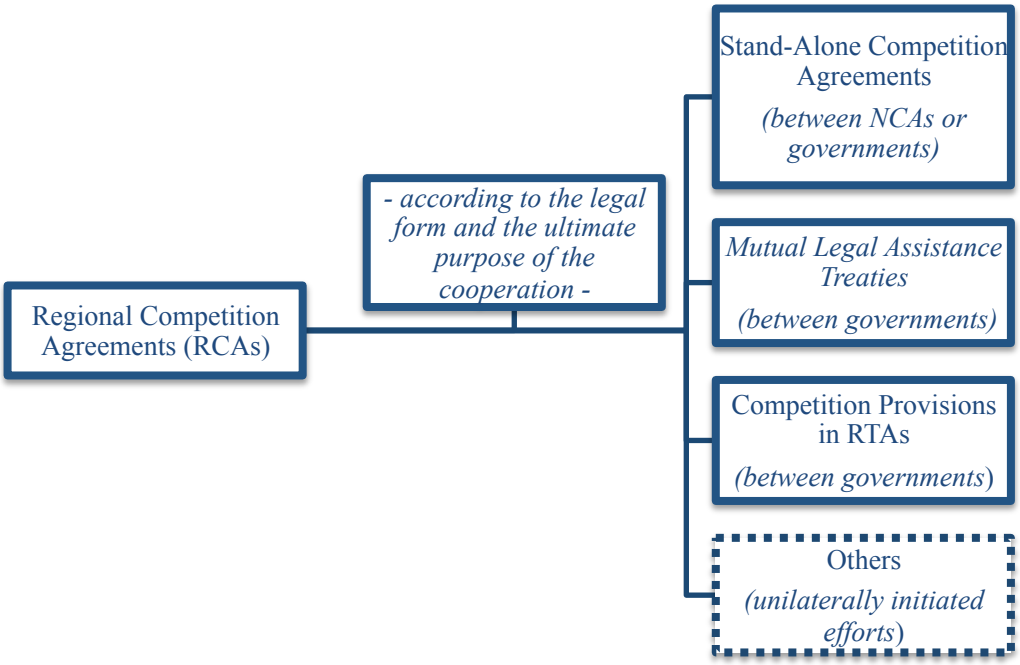
[2] (Holmes, Papadopoulos, & Sydorak, 2006), pp. 41-42. Also on the effect of the OECD Recommendations on international cooperation, see (Zanettin, 2002), pp. 53-6. Zanettin notes that the revised versions of the OECD recommendations were inspired from then existing major regional competition agreements (in particular from the 1991 EC/US Agreement).

In non-binding competition agreements information exchange is in effect dependent on the willingness of the parties to cooperate. In such agreements parties assess their national interests in sharing the requested information on every single occasion.

The protection of confidential information, when applicable, is often the chief concern of regional cooperation in specific enforcement cases. Another major concern on regional cooperation in competition law enforcement is the possible differences in domestic competition laws and enforcement procedures of the parties. These factors will be examined in detail in the following sections.

Regional competition agreements will be examined below using two taxonomies. The first is based on the legal form and ultimate purpose of regional competition agreements. Accordingly, a distinction is made between stand-alone competition agreements, mutual legal assistance treaties, competition provisions in RTAs, and unilaterally initiated efforts at achieving regional cooperation.[3] The second taxonomy focuses on the depth of cooperation in competition law enforcement under regional competition agreements.

3.1.1 First Taxonomy: based on legal form and ultimate purpose of the cooperation between the parties



[3] (ICN, 2007b), pp. 7-8; (Rosenberg & Tavares de Araújo, 2005), p. 191.

Stand-Alone Competition Agreements:

As the name implies, stand-alone competition agreements are dedicated to competition policy matters only. These agreements may be executed between the governments or the NCAs of sovereign jurisdictions. Alternatively, they can take the form of a memorandum of understanding (MoU) signed by and between NCAs.[4]

Cooperation under this group of agreements is often in the form of exchange of non-confidential information, notification of activities that may affect partner jurisdictions, coordination of enforcement activities, and joint research and education programmes. In addition there are a small number of stand-alone cooperation agreements that facilitate deep cooperation by exchange of confidential information (e.g. 2004 US/Canada agreement[5], 2013 EU/Switzerland Agreement[6]).

Independent of the depth of cooperation they envisage, stand-alone competition agreements have essentially no binding effect[7], and therefore their enforcement is largely free from political tension. Likewise, given that cooperation under stand-alone competition agreements is voluntary, actual cooperation inevitably depends on the willingness of the parties to share information or to initiate an investigation requested by partner jurisdictions.

Stand-alone competition agreements aim at increasing the efficiency of *domestic* competition law enforcement of signatory jurisdictions. Even when an agreement envisages highly developed and close regional cooperation, legal enforcement by the parties remains to be administered domestically.

Mutual Legal Assistance Treaties

An alternative mechanism facilitating cooperation between independent jurisdictions on legal enforcement is mutual legal assistance treaties (MLATs). The primary purpose of

[4] As stand-alone competition agreements are essentially non-binding the use of a MoU or an agreement does not make any substantial difference.

[5] Agreement between the Government of the United States of America and the Government of Canada on the Application of Positive Comity Principles to the Enforcement of Their Competition Laws; signed on October 5, 2004.

[6] Agreement between the European Union and the Swiss Confederation Concerning Cooperation on the Application of Their Competition Laws; entered into force on February 5, 2014.

[7] (Marsden & Whelan, 2005), p. 10. See also,(Petrie, 2012), p. 18. After examining 51 stand-alone regional competition agreements among NCAs of independent jurisdictions, and 41 RTAs that contain competition policy related provisions, Petrie develops a 7-level taxonomy for covering different forms of regional cooperation in competition. According to Petrie's data-set none of the stand-alone regional competition agreements is of a binding character.

MLATs is to define processes and timelines for cooperation in legal enforcement.[8] Unlike stand-alone competition agreements, MLATs cover cooperation in the legal enforcement of various policies, and they have been traditionally restricted to criminal law matters.[9]

MLATs impose legal obligations on the parties to assist each other and to share confidential information concerning specific enforcement cases. A typical MLAT would oblige the parties to assist each other in:

i. *"taking testimony and statements in the requested jurisdiction;*

ii. *serving process;*

iii. *providing documents or records located in the requested jurisdiction;*

iv. *executing requests for searches and seizure;*

v. *in some cases, giving any other form of assistance 'not prohibited by the law of the requested jurisdiction' or 'consistent with the objects of the treaty'. "*[10]

However, parties may refuse to cooperate (a) when the provision of assistance impairs their essential (national) interests or important public policies, or (b) when the investigated offence is political in nature, or (c) when the request cannot be investigated under domestic laws and procedural regulations of the parties.[11]

Although there are a significant number of bilateral (and a few multilateral) MLATs, not all of these agreements can be used for cooperation in competition law enforcement.[12] In this regard MLATs may explicitly exclude cooperation in competition law enforcement. Alternatively, they may limit the scope of cooperation to criminal matters and therefore require at least the requesting party, if not both parties, to have criminal jurisdiction in regard to competition legislation.[13] That not all jurisdictions give competition law criminal status limits the applicability of MLATs to competition law matters. Likewise, although MLATs are powerful legal instruments in creating legal obligations and facilitating exchange of confidential information, in practice their

[8] (International Chamber of Commerce, 2012).
[9] (OECD, 2013), p. 37.
[10](ICN, 2007b), p. 15.
[11] Ibid., p. 16.
[12] Ibid., pp. 15-17.
[13] Ibid.;(OECD, 2013), p. 37. (Holmes et al., 2006) notes that the use of MLATs '*has recently been extended from classical criminal matters to criminalised antitrust offences*' (pp. 52-3).

positive effect is reduced due to the jurisdictional differences in the rules on the investigation processes and confidentiality requirements, as well as differences in enforcement timelines.[14] Furthermore, it is reported that NCAs find cooperation via MLATs complex and time-consuming since cooperation often requires the involvement of courts or foreign affairs officers.[15]

It is known that MLATs are used in competition law enforcement by some developed jurisdictions, especially by the US.[16] However, no evidence could be found on the active *use* of MLATs by developing countries for competition law enforcement.[17] However, due to the concerns on procedural fairness and respect for the rule of law, MLATs are less likely to be signed by or enforced in developing countries.

Competition-Related Provisions in RTAs:

The main difference between stand-alone competition agreements and competition related-provisions in RTAs is that in the latter group of agreements competition policy is not the primary focus of the cooperation between the signatory jurisdictions. Especially in deep RTAs, competition policy is only one component of a very broad set of regional economic (and social) integration arrangements. RTAs are also distinct from MLATs as the former group of agreements entails not only cooperation in *law enforcement* but also regional *coordination of substantive policies*.

In the literature there is an on-going debate on the goals of competition policy provisions in RTAs. After examining 86 RTAs notified to the WTO from 2001 to July 2005, Solano and Sennekamp (2006) concluded that '*trade is the overriding principle*' of RTAs,[18] and accordingly, competition policy has a rather complementary role in realising the trade objectives of respective agreements. Gerber (2010) made a similar observation on the competition policy in the early times of the European Union (EU).[19]

[14](ICN, 2007b), p. 16.
[15](OECD, 2013), p. 43.
[16] See, (Holmes et al., 2006), p. 51-53. (ICN, 2007b) notes that '*the USA alone has well over 50 MLATs with other jurisdictions*' (p. 15). However, the authors do not discuss the applicability of these MLATs to competition law enforcement.
[17] A recent OECD/ICN survey that examines a data set collected from 57 jurisdictions (of which 58% OECD members, 22% OECD observers, and 20% only ICN members) concludes that MLATs and Letters of Rogatory (see below) are among the least available legal instruments for non-OECD countries. See (OECD, 2013), table 8, p. 38.
[18] (Solano & Sennekamp, 2006), p. 9.
[19](Gerber, 2001), pp. 332-391.

By contrast, Anderson and Evenett (2006) criticised Solano and Sennekamp for making an unclear suggestion, and argued that '*there is no evidence whatsoever of a subordination of competition policy principles to trade "tests" or concerns. On the contrary, the agreements typically treat the subject of competition law and policy on its own terms.*'[20] A similar assessment is made by Teh (2009), who examined competition-related provisions in 74 RTAs and concluded that a '*...large proportion of RTAs (42 per cent of the sample) see the promotion and advancement of "conditions of fair competition" between the RTA partners as one of the principal objectives of the trade agreement. (...) many RTAs place an intrinsic or independent value on the promotion of competition and do not consider it as necessarily subordinate to the trade goals of the agreement*.' [21]

This paper argues that the goals of regional competition law and enforcement under an RTA should be considered in the context of the role given to the competition policy in the broader integration objective of the respective RTA. When the purpose of competition provisions in an RTA is to ensure the presence of a *national* competition enforcement regime in all member states, then these provisions often have no direct influence on the goals and implementation priorities of national competition policies of the signatory jurisdictions.[22] The main purpose of competition provisions in such RTAs appears to be to ensure that the trade agreement between the parties shall be subject to the national competition enforcement regime of each member state. It is believed that this may offer an explanation why competition policy provisions in RTAs are treated separately, and expected to function in a vacuum, on their own terms. On the other hand, however, if competition policy plays a more significant role in achieving deep integration, this may imply a change in the goals of regional competition policy. These points are further investigated below.

In his insightful study on the role of competition and anti-dumping policies in RTA the starting point for Hoekman (1998) was the distinction between shallow and deep RTAs. According to him, shallow integration aims to achieve free trade by eliminating (national) trade policies. This implies that shallow integration concerns '*zero tariffs and*

[20] (Anderson & Evenett, 2006), pp. 25-26.
[21] (Teh, 2009), p. 464.
[22] An exception to this might be agreements that require one or more parties to adopt or revise their national competition laws in a specified way. However, even in such agreements the goals and enforcement priorities of the parties in relation to competition law are decided domestically.

quotas' and '*the abolition of contingent protection*' only.[23] On the other hand, deep integration '*consists of explicit actions by governments to* ***reduce the market segmenting effect of differences in national regulatory policies*** *that pertain to products, producers and natural resources.*'[24] In practice deep integration often translates into policy harmonisation and mutual recognition of certain national standards across a regional bloc.[25] Hoekman submits that '*the economic impact of shallow RTAs may far exceed that of deep RTAs*'.[26] In other words, achieving economic gain from free trade is not necessarily linked to deep integration of regulatory policies, including the competition policy. Accordingly, Hoekman concludes that competition policy in deep RTAs is driven by a broader integration objective, rather than being seen as a necessary condition for giving up (national) trade policy instruments.[27]

In line with Hoekman's suggestion this paper argues that competition provisions in RTAs can have different aims depending on the form and the extent of cooperation between the signatory jurisdictions. Therefore the role of regional competition policy must be examined in the context of broader (economic and social) integration objectives of any individual RTA. With regard to a shallow RTA, which aims solely at reduction of tariffs and other duties for goods, the role of the competition provisions is likely to be limited to the prevention of disturbances to internal trading of goods and/or services by anti-competitive activities without seeking extensive policy harmonisation. This is because the superior -*if not the sole*- motive of the parties in entering into a shallow RTA is to achieve economic gains from elimination of tariff and other duties. In this regard such anti-competitive disturbances might be avoidable when member states have workable *national* competition law regimes. Although globalised markets and internationally organised anti-competitive behaviour often require cooperation between NCAs in gathering and analysing evidence, as seen above, this requirement can be met by simpler forms of regional competition agreement, such as stand-alone competition agreements. Then the question that arises is why countries prefer to include competition provisions in RTAs, rather than deal with competition policy separately. One explanation is that countries may prefer to get an additional commitment from their regional partners to ensuring the enforcement of the *national* competition laws of the

[23] (B. Hoekman, 1998), pp. 3-5.
[24] Ibid. (emphasis added).
[25] Ibid.
[26] Ibid.
[27] Ibid., p. 36.

parties to intra-regional trade. This seems to apply to a vast number of shallow RTAs which include only simple provisions intended to ensure the existence and responsibility of national competition enforcement bodies in the signatory jurisdictions.[28]

Alternatively, governments might see competition policy provisions in RTAs as a substitute for stand-alone competition agreements. However, this might mean that the parties agree to cooperate on competition matters only when a case can be linked to the RTA. If so, then the aptness of the RTA for the exchange of information will be problematic when an NCA of a member state seeks information located in the territory of another member state for purposes of an investigation concerning its domestic markets only, or concerning an extra-regional transaction with a third state firm. Thus RTAs might not be a good substitute for stand-alone competition agreements unless the scope of application of the competition provisions in the former are explicitly extended beyond the subject-matter of the RTA. No RTA could be identified to confirm the latter scenario.

Another reason for inclusion of competition provisions in RTAs might be to promote intra-regional free trade and ensure a level playing field for the market players. Even today, despite the clear prohibition in the Article XXIV:8a of GATT, not all RTAs are successful in eliminating barriers to '*substantially all trade between the constituent territories*'. In many RTAs parties prefer to exclude certain sectors from regional economic integration or to preserve some of their regulatory policies. Although competition policy, and in particular state aid provisions, might be used to address some of these issues, they often have limited effect on self-interested interventions of national governments in trade.[29] Deeper integration in broader economic and social policies may reduce restrictive national trade policies in two main ways. Firstly, deep RTAs may ban certain regulatory tools used by governments for intervening in trade. Secondly, deep RTAs may boost the joint trade interests of the parties and therefore reduce the incentives for national interference. Moreover, if an RTA envisages deep integration of various policy areas in the absence of a common competition policy, the differences in

[28] Some RTAs between developing and developed countries include provisions for establishment of a national competition law and enforcement system in the developing partner (e.g. EU – Mediterranean Agreements). These agreements can be instructive on the content of the competition legislation in the respective developing countries at the beginning. However in the longer term competition enforcement in the parties will be national.
[29] (B. Hoekman, 1998), p. 40.

domestic competition law of the parties may create inequalities for the market players across the region. More strict competition law enforcement in one member state might put the local firms, and indirectly the economy, of that member state at a disadvantage in the respective regional bloc. Presumably such disadvantages are likely to increase the more inter-linked national economies of member states. If so, then achieving a common understanding of the competition policy might be necessary especially for member states of a deep RTA. In practice a common understanding of competition law and enforcement priorities may develop automatically over time between jurisdictions, especially between major trade partners. Alternatively, such commonality may be achieved by inclusion of common regional competition rules in deep RTAs *and* by coordination of competition law enforcement in member states from a regional centre. This issue will be discussed further in Section 3.2.3 below.

Lastly, some developing countries may expect further competition-specific efficiencies from RTAs. Developing countries with small-or-micro-sized economies in particular may not be able to afford a *national* competition law enforcement regime, and therefore, consider an integrated competition law enforcement system under a deep RTA a solution.

The above suggests that a dual role might be given to competition provisions in RTAs. Accordingly, regional competition policy might be expected (a) to strengthen intra-regional free trade and/or economic integration, and (b) realise the conventional competition policy objectives such as protection of free competition and promotion of economic efficiency and consumer welfare. There is also some evidence that the additional intra-regional free trade objective may affect the goals of regional competition law *enforcement* when parties pursue a deeper level of economic (and social) integration under an RTA.[30]

Returning to the distinction between stand-alone competition agreements, MLATs and competition provisions in RTAs, it is observed that competition provisions in RTAs may either be dispersed among different chapters or regulated under a dedicated competition policy chapter. Furthermore, unlike stand-alone competition agreements, there are a small number of RTAs that entail binding provisions on competition policy. As will be explained in the next section, binding competition provisions are found only

[30] (G. Lipimile & Gachuiri, 2005), p. 366-8; (Solano & Sennekamp, 2006), p. 9; (Teh, 2009), p. 472. See also, (Rosenberg & Tavares de Araújo, 2005), p. 204-5.

in deep RTAs. Nevertheless, the majority of RTAs exclude competition provisions from the scope of existing dispute resolution mechanisms, and therefore give a non-binding character to the respective competition law provisions. Although both deep RTAs and MLATs may create obligations binding on the signatory jurisdictions, unlike MLATs, cooperation under RTAs is not bound to the criminal status of the competition legislation in the respective jurisdictions. In addition, as stated above, strengthening the intra-regional free trade function of competition provisions in deep RTAs distinguishes these agreements from MLATs.

Unilaterally Initiated Efforts towards Strengthening Regional Cooperation

Besides formal bilateral or multilateral competition agreements there are certain initiatives unilaterally undertaken by some jurisdictions in order to facilitate regional cooperation in competition law enforcement. Since such unilateral actions are taken in the absence of a formal agreement, they are technically outside the scope of regional competition agreements that constitute the focus this chapter. However, brief explanation will be offered below for the sake of completeness.

There are three major legal instruments that can be used by independent jurisdictions to facilitate or strengthen regional cooperation in competition law enforcement. These are domestic competition law, confidentiality waivers, and letters of rogation.

Domestic competition laws can be drafted to make inter-NCAs cooperation easier. § 50(b) of the German competition law, which authorises the German Federal Cartel Office (*i.e. Bundeskartellamt*) to cooperate with the NCAs of other jurisdictions, also in the absence of a formal agreement, is an example.

In addition, domestic competition law enforcement bodies may strengthen and speed regional cooperation in competition law enforcement by requesting confidentiality waivers from the parties subject to their investigation in order to address the statutory limitations preventing them from sharing confidential information. Although such a waiver can be obtained following an official request from other NCAs under a regional competition agreement, a prior unilateral action of an NCA can speed regional cooperation and may also contribute to developing a cooperative culture between the competition enforcement officers of different NCAs.

Lastly, letters of rogation can be used to obtain information from other jurisdictions on competition law enforcement. In the US, letters of rogation are defined as '*the customary method of obtaining assistance from abroad in the absence of a treaty or executive agreement*.'[31] Letters of rogation can be issued by courts to request investigatory assistance from a foreign court in a pending action. Fulfilment of the requests depends on the comity of courts towards each other. Although they can be used to obtain specific evidence, letters of rogatory are likewise MLATs, customarily transmitted via the diplomatic channel and therefore constitute a time-consuming and complex means of cooperation.[32]

Although all three legal instruments described in this sub-section can be helpful in strengthening regional cooperation in competition law enforcement, their use is on the initiative of the domestic courts or competition agencies. Therefore these mechanisms can be effectively used only when the courts/agencies trust the enforcement capacity of one another, and the reciprocal benefits of cooperation.

3.1.2 Second Taxonomy: based on depth of cooperation between the parties

There is a broad spectrum of legal arrangements and informal practices regarding regional cooperation in competition policy between independent jurisdictions. A good overview is offered by Petrie (2012), who developed one of the most detailed taxonomies on the levels of regional cooperation on competition law enforcement. The taxonomy is based upon a dataset which compromises 51 stand-alone regional competition agreements and 41 RTAs with competition policy chapters.[33] According to Petrie, his dataset represents 61% to 71% of all agreements dealing with regional cooperation in competition policy.[34]

Petrie (2012) breaks down regional competition agreements into seven groups according to depth of cooperation. Petrie's taxonomy *–which he names the EJI (enforcement jurisdictional integration) Index–* may be summarised as follows:

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[31] United States Attorney's Manual, Criminal Source Manual 275, available at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00275.htm (accessed on July 1, 2013).
[32] Ibid.; (ICN, 2007b), pp. 16-17; and (OECD, 2013), p. 43.
[33] (Petrie, 2012), p. 8.
[34] Ibid. p. 9.

Level	Title	Description
1	Informal Cooperation	Cooperation in the absence of a formal agreement.
2	Cooperation Short of Notification	Cooperation in general issues excluding support in individual case reviews. This may include general discussions, joint research, technical assistance, exchange of staff, etc.
3	Basic Notification	Basic notification requirement concerning an NCA's enforcement actions that may have an impact on the interests of another (signatory) jurisdiction.
4	Detailed Mutual Enforcement Cooperation	Agreements that contain one or more of the following: '*Some specification of the circumstances surrounding when or how notification should take place.* *Assistance with gathering of voluntary evidence on behalf of a foreign* [NCA]. *Seeking waivers for the release of confidential information.* *A reference to possible coordination of parallel investigations, with at least some fleshing out of what this might entail.* *Notification when one authority becomes aware that anticompetitive activities themselves are taking place that may affect the other party's interests*.'
5	Positive Comity[35]	Agreements that allow an NCA to request another (cooperating) NCA to open or expand an investigation. However, the requested NCA is only required to consider such a request, but not obliged to take an action.
6	Advanced Jurisdictional Interface Rules	Agreements that contain one or more of the following: '*In addition to the basic positive comity clause, identification of the circumstances when an* [NCA] *requesting another* [NCA] *to initiate an investigation may defer or suspend its own investigation in the meantime.*

[35] A relevant term, 'negative comity' concerns a lighter form of cooperation. According to Petrie, '*traditional* [negative] *comity refers to a country considering avoiding taking an action because it may harm another country's interest…*' Petrie also notes that negative comity is included in levels 3 or 4. (Petrie, 2012), p. 6.

		The use of compulsory powers to obtain evidence for a foreign [NCA]. *Sharing of confidential information without waiver for its release from those who provided it.* *An agreement to provide assistance on whether or not the conduct being investigated is an offence under the laws of the requesting* [NCA].'
7	Third Party Enforcement	Agreements that establish a supra-national competition authority to enforce competition law.

Source: *Compiled from Petrie (2012), pp. 5-7.*

Although the above taxonomy demonstrates the different levels of cooperation in competition law enforcement, as acknowledged by Petrie himself, it does not indicate anything about implementation and effectiveness of actual competition agreements at each level.[36] Nor does Petrie's dataset include investigatory assistance on the basis of MLATs.[37]

One interesting finding of Petrie's study is that, apart from the seventh level, competition provisions in none of the regional competition agreements are legally binding.[38] In other words regional cooperation in competition policy seems to occur solely on voluntary grounds except when jurisdictions are dedicated to *integrate* their competition law enforcement activities under the supervision of a regional authority. In line with this, the respective study shows that all of the level seven competition agreements are RTAs rather than stand-alone competition agreements.[39]

Nevertheless, a minor correction is due with respect to the above definition of the seventh level of cooperation by Petrie. In his paper Petrie requires establishment of a '*supra-national*' competition authority for qualification for the seventh level; and he refers to CARICOM, Andean Community, WAEMU, and CEMAC as the relevant examples.[40] It is believed that the emphasis on the 'supra-national' character of regional

[36] Ibid. pp. 20-21.
[37] In terms of the means of cooperation, it is believed that a typical MLAT would fall under Level 6 of Petrie's index.
[38](Petrie, 2012), pp. 20-21.
[39] Ibid., p. 10. In the seventh level of Petrie's index the agreement on the European Competition Network (ECN) is classified as a stand-alone competition agreement. However, it is believed that this cannot constitute an exception to the above statement given that the ECN is a clear extension of the EU's integration agreements.
[40] Ibid., p. 7.

competition authorities does not accurately represent the group of agreements Petrie considers for the seventh level of regional cooperation in competition.[41] Some of the respective regional blocs embrace *inter-governmental cooperation*, and thereby restrict the power of their regional competition authorities accordingly.

Most RTAs do not include explicit provisions on the supranational nature of their regional laws. In practice the supranational power of regional legislation might derive from the decisions of regional courts that are exclusively authorised to interpret the regional integration treaties (e.g. the EU and WAEMU). As a general rule, however, national governments like to preserve the power within their countries, and therefore prefer *inter-governmental cooperation* to transfer of power to a supra-national institution.

The unwillingness of national governments to relinquish power can be reflected in the wording of RTAs in several ways. A known example is the approval requirement brought on the decisions of regional competition authorities. An RTA can explicitly rule that the decisions of the regional competition authority will gain legal force only after the representatives of all member state governments grant an approval. Alternatively, the supranational character of a regional competition authority might be diminished by drafting the law in such a way as to make the operations of the regional competition authority highly dependent on the cooperation of the NCAs of the participating jurisdictions. Both of these cases indicate the absence of a genuine supra-national authority.

The CARICOM Competition Commission can be cited as an example of a regional competition authority that currently lacks a genuine supra-national power. According to Articles 175-176 of the Treaty of Chaguaramas, operations of the CARICOM Competition Commission are largely dependent on the cooperation of the NCAs of the CARICOM member states, and in some cases on the approval of the CARICOM

[41] The Oxford Dictionary defines 'supra-national' as '*having power or influence that transcends national boundaries or governments*' - [http://oxforddictionaries.com/definition/english/supranational?q=supranational (accessed on July 27, 2012)]. In this respect, policies as well as decisions adopted by a supra-national body are deemed to be superior to those of national authorities of the participating jurisdictions, given that the supra-national body acts within the limits of its legally defined areas of authority. However, not all RTAs under which participating jurisdictions agree on establishing an *integrated* regional competition law enforcement mechanism aim to establish a regional competition authority with *supra-national* powers.

Council for Trade and Economic Development, the latter of which is a regional institution formed by political agents of the CARICOM member states.[42]

On the other hand, in some cases supra-national authority might be significantly restricted by crucial implementation difficulties created by institutional design problems and/or by political disagreements between the member states. The WAEMU is an example of such regional blocs. The WAEMU member states reject the exclusive decision-making power of the WAEMU Competition Commission concerning anti-competitive practices despite the explicit ruling of the WAEMU Court of Justice in this direction; thus the West African Competition Commission fails to discharge its decision-making authority.[43]

In light of the above it is believed that a more appropriate definition of the seventh level of the Petrie's EJI Index would be '*the agreements establishing a regional competition law enforcement body, and anticipating the (partial or full) integration of the competition law enforcement activity within the region'*. This definition corresponds to the 'regionally integrated competition law enforcement' concept, which is the focus of this thesis.

Undoubtedly Petrie's EJI Index gives an important insight into the different levels of regional cooperation in competition policy. However, given the voluntary character of cooperation in the first six levels and the lack of data on implementation as well as effectiveness of competition agreements under each level, it is not clear whether the practical implications of these seven levels are appreciably different from one another.[44]

Unlike Petrie's Index a taxonomy widely cited in the literature examines the depth of regional competition agreements at only two levels. Accordingly, competition agreements are categorised on the basis of a single determinant, that is, whether they entail exchange of confidential information.[45] Regional competition agreements under which cooperation is strictly limited to exchange of non-confidential (publicly-available) information are called '*first generation agreements*'. On the other hand, regional competition agreements that entail exchange of confidential information are

[42] (Stewart, 2012), pp. 180-1.
[43] (Bakhoum & Molestina, 2012), pp. 89-100.
[44] Probably due to this difficulty, under the respective paper, Petrie conducted his own analysis of the depth of regional cooperation by only differentiating between high cooperation (level five and higher) and low cooperation (levels one to four); see (Petrie, 2012), p. 12-8.
[45] (Rosenberg & Tavares de Araújo, 2005), pp. 192-3

called '*second generation agreements*'. Second generation agreements may also involve provisions on cooperation between the NCAs on evidence gathering on behalf of one another (i.e. positive comity and beyond).

The most significant implication of the distinction between first and second generation agreements is that the latter can facilitate exchange of sensitive evidence concerning specific enforcement cases among the participating jurisdictions. Although it is certain that information exchange on specific enforcement cases can significantly improve the potential benefits of regional cooperation, in reality this distinction is still not very informative since cooperation under the great majority of the regional competition agreements is voluntary, and governments consider the interest of their own jurisdictions pertaining to information exchange on a case-specific basis. In this respect, the depth of cooperation under a deep RTA obliging member states to harmonise and coordinate their competition laws and enforcement is clearly distinguishable.

In practice regional competition agreements between jurisdictions with different levels of economic development and different competition cultures are generally less ambitious.[46] Such agreements allow exchange of limited types of information and focus more on voluntary technical assistance given by the more developed party to its less developed partner. On the other hand, high level of cooperation in competition demands similarities in national legal frameworks and enforcement capabilities.[47]

Deeper-cooperation under second generation agreements facilitates exchange of sensitive information about domestic firms of, and commercial transactions taking place in, the signatory jurisdictions. Exchange of sensitive information under these agreements can raise confidentiality issues and political tensions; and in the extreme case of misapplication, the exchanged information might be prejudicial to the individual economies of the respective parties (through an influence on the profitability of their domestic firms). Therefore second generation agreements are signed only when there is convincing evidence of the mutually beneficial nature of the cooperation. In this respect similarities in domestic competition policies, legal enforcement capabilities as well as institutional set-up of all signatory parties gain importance. The level of internal trade between the signatory parties is also taken into account, since, as noted earlier on, the

[46] Ibid.
[47] Ibid., pp. 2012-3; (Petrie, 2012), p. 10. In this regard, see the strong emphasis on the similarities between the EU's and Switzerland's competition policies and the resultant 2013 EU/Switzerland Agreement which envisages exchange of confidential information as well (see fn. 6 above).

potential benefits of deep cooperation in competition will increase, *ceteris paribus*, in parallel with an increase in the volume of internal trade between the parties.

In line with the above, empirical data available in the literature indicates that most second generation agreements are entered into by advanced jurisdictions with established legal frameworks and enforcement capacities.[48] With respect to developing countries, arrangements for exchange of confidential information are generally found in connection with deep RTAs that aim to integrate competition law enforcement within the respective regions (i.e. the 7th level of Petrie's Index).[49]

In light of the above two conclusions can be drawn. Firstly, cooperation under second generation agreements ideally requires a degree of advancement in competition law enforcement, and more generally in legal enforcement, in all cooperating parties. In line with this requirement, the agreements used in Petrie's dataset suggest that similarities in domestic competition law of the parties and high intra-regional trade potential increase the incentives of the national governments to enter into second generation agreements.

Secondly, the agreements examined in Petrie's dataset also suggest that developed and developing countries approach the above-mentioned pre-conditions of *deep* cooperation in competition policy differently. With the exception of the competition enforcement within the EU, developed countries with advanced *national* competition regimes prefer voluntary cooperation under a stand-alone second generation competition agreement to a deep RTA. The reason developed jurisdictions can cooperate under more flexible legal mechanisms is likely to be related to the mutual trust of the parties in one another's legal system, procedural fairness and institutional structure. The situation of developing countries, however, is substantially different. As lower level of development usually comes along with deficiencies in legal enforcement and procedural fairness, developing countries seem to favour binding agreements and deep RTAs.[50] In this respect deep RTAs not only anticipate regional cooperation in competition law enforcement, but also

[48] (Rosenberg & Tavares de Araújo, 2005), pp. 192-3 and 201-3; (Petrie, 2012), p. 10.
[49] The data-set used in (Petrie, 2012) supports the absence of a stand-alone second generation agreement concluded between developing countries (p.10).
[50] Although the above suggestion is counterintuitive developing countries seem to be less anxious about noncompliance with the provisions of deep RTAs they conclude with other developing countries than with any other binding legal arrangement they make with developed countries. This might be justifiable on the ground that deep RTAs between developing countries are arguably enforced on more flexible terms. Chapter 6 will examine this flexibility aspect of deep RTAs concluded between developing countries.

aim at achieving the minimum standards concerning institutions and policy coherence required for facilitating actual regional cooperation.

Unlike stand-alone competition agreements and competition provisions in RTAs, there is little in the literature on the availability and effectiveness of MLATs concerning regional cooperation on competition law enforcement. However, as noted earlier, few studies suggest that MLATs are not widely applied to competition law matters, especially by developing countries. Moreover, since judicial assistance under an MLAT is often complex and involves courts and the diplomatic channels, MLATs are likely to be a less preferable alternative to other types of regional competition agreement. Furthermore, as noted above, MLATs are traditionally restricted to criminal matters, and therefore, in many jurisdictions, some or all aspects of competition investigations are excluded from the scope of MLATs. Due to limited use of MLATs by developing countries, discussion in the following sections concerns only stand-alone competition agreements and competition provisions in RTAs.

3.1.3 The distinction between regional integration and regional cooperation

This thesis discusses the question whether regionally integrated competition law enforcement systems under deep RTAs can help to address competition law enforcement problems of developing countries. The focus of the thesis is on regional competition agreements at the deepest cooperation level in Petrie's EJI Index.

It is believed that the agreements that anticipate the integration of competition law enforcement within a regional bloc (i.e. agreements establishing a regionally integrated competition law enforcement system) are distinguished from other regional competition agreements mainly on five grounds. Firstly, from a technical point of view and with no exception, all existing agreements entailing adoption of regional competition law and an integrated legal enforcement system are formed as a part of a deep RTA which aims at achieving a common market or a deeper form of economic integration.[51] Therefore, as discussed in Section 3.2.1 above, competition policy in a deep RTA is mainly driven by the broader economic (and social) integration motive. In line with this, regional

[51] The agreements that are listed in the seventh level of Petrie's index are EC(1957), EFTA (1960), ANDEAN Group Decision 285 (1991), EEA (1994), WAEMU (1994), CEMAC Reg. 1/99 (1999), CARICOM Protocol VIII (2000), and COMESA Regs. (2004) – The index also lists the European Competition Network as a stand-alone competition agreement; however, for the purposes of this research it is not possible to consider the respective platform separate from the EU. (Petrie, 2012), p. 10.

competition policy in such deep RTAs is usually intended to serve free trade (and possibly other core) objectives of the respective regional integration besides achieving traditional competition policy goals.

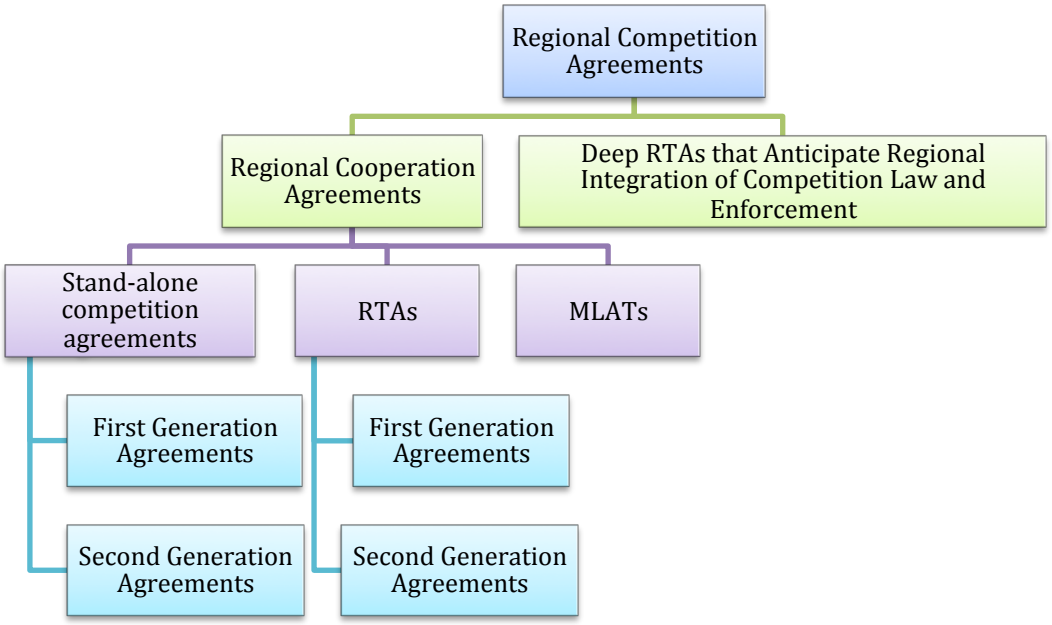
Secondly, the regional competition policy under a regionally integrated competition law enforcement system needs to be designed with an attempt to reconcile the interests of the regional bloc as a whole with the individual interests of the signatory parties.

Thirdly, such deep RTAs typically require the parties substantially to harmonise their law on competition policy, and more generally on trade policy, and constantly to coordinate their national competition policies, if any. Moreover, the establishment of a regional competition authority, which partially or fully undertakes competition law enforcement in the region, may further strengthen the integration of competition law enforcement under a deep RTA. Legal coherence cannot be achieved at the same pace through cooperation under the other types of regional competition agreement. By contrast, in all other regional competition agreements, the goal is to facilitate *cooperation* between fully independent national competition regimes. This means competition policies of the parties are governed and the objectives and priorities of competition enforcement are decided domestically in each participating jurisdiction.

Fourthly, some developing countries with small or micro economies may not be able to afford a domestic competition law regime. For these countries in particular a deep RTA may be seen as the only way to ensure the protection of competition within their territories. If so, then one purpose of a deep RTA between such countries would be to establish a joint competition law enforcement system, which clearly cannot be replicated by a simple *cooperation* agreement on competition policy. Although in theory a regionally integrated competition law enforcement system can be regulated under a stand-alone agreement, as mentioned above, so far there has been no such stand-alone competition agreement. This might be explained by the high economic and political costs of establishing such a system, low priority of competition policy in the face of more urgent development needs, and the potential influence of the competition policy on market players and, in line with this, on the economic activity in the respective markets.

Lastly, efficiencies parties can achieve by establishing a regionally integrated competition law enforcement system can be far more significant than those can be

achieved by a mere regional cooperation agreement on competition policy. This is mainly due to the positive influence of the formation of a common market on competition law enforcement. The next section explores this claim further by examining the potential benefits and costs of regional competition agreements with the aim of giving a comparative account of different levels of regional cooperation.



In the next section a distinction will be made between regional cooperation agreements and deep RTAs that aim to establish a regionally integrated competition law enforcement system. A further distinction will be made between shallow and deep regional cooperation agreements. Accordingly, regional cooperation agreements, which entail exchange of non-confidential information, will be considered first-generation agreements; and regional cooperation agreements, which entail exchange of confidential information, will be considered second -generation agreements. Due to limited literature on the subject and the limited use of MLATs by developing countries MLATs will not be examined in the following sections.

Section 3.2 Potential Benefits and Costs of Regional Competition Agreements

Numerous factors may affect the convenience and effectiveness of cooperation under a regional competition agreement. Factors such as the depth of cooperation envisaged in the agreement, enforcement capacity of the signatory parties, the level of internal trade

in the relevant region, and similarities in legal and institutional traditions of the signatory parties may determine the success of regional cooperation. These factors may also interplay with one another. For instance, as mentioned above, enforcement capacity and the volume of internal trade usually play a decisive role in the parties' choice of level of cooperation under a regional competition agreement. Even when these factors are not considered by the signatory jurisdictions prior to the execution of a regional competition agreement, any dissimilarity between the parties concerning the above points will inevitably affect the actual use of the cooperation mechanisms, and the benefits the parties can gather from regional cooperation in competition.

The following sections examine the potential benefits and costs of regional competition agreements. In so doing, the analysis heavily relies on the existing literature except in two respects.[52] Firstly, this study adopts a novel classification of the respective benefits and costs in an attempt to compile all relevant studies. Secondly, the cost-benefit analysis below is made with a comparative account of different types of regional competition agreement. In line with the requirements of main research question, the assessments are made mainly from the perspective of developing countries.

3.2.1 Benefits of Regional Competition Agreements

In light of the above, potential benefits of regional cooperation on competition are examined below under six headings: (i) ease of gathering evidence, (ii) cost efficiencies in legal enforcement, (iii) countering anti-competitive conduct, (iv) increased deterrence of *international* anticompetitive conduct, (v) increased bargaining power, and (vi) reduced influence of national vested interest groups and daily national politics.

Ease of Gathering Evidence

As mentioned in the previous section, most regional competition agreements include provisions on exchange of information and technical assistance. Although the amount of exchanged information varies depending on the depth of an agreement, even loose arrangements for regional cooperation may be helpful in relieving the difficulties of gathering cross-border evidence. As the amount of information exchange on specific

[52] Relevant studies include (Rosenberg & Tavares de Araújo, 2005), (Guzman, 2007), (Gal, 2010b), (Gal, 2011), (Gal & Wassmer-Faibish, 2012).

enforcement cases increases, the potential advantages in terms of evidence gathering are likely to increase as well. In practice the influence of first generation agreements, however, is generally limited to the development of skills in the technical aspect of evidence gathering.

Concerning regional cooperation in evidence gathering, *confidentiality* constitutes the principal issue, which may block the actual cooperation between the parties. Jurisdictions may have different standards on deciding what is confidential and how to protect it. Due to different national attitudes towards confidentiality, countries may avoid entering into a second generation agreement, or when they enter into one, they may refrain from active cooperation. A cartel investigation by the Turkish Competition Authority in the seized coal market may be cited as an example.[53] In its investigation the Turkish Competition Authority sought the cooperation of the NCAs of one EU member state and one EFTA member state (i.e. Austria and Switzerland, respectively) for the collection of evidence on the operations of two suspected firms that had offices in the territories of the two states. Although the customs union agreement between Turkey and the EU[54], as well as the FTA between Turkey and EFTA[55], envisages cooperation in competition law enforcement by way of positive comity, the respective NCAs refused to provide information on the basis of confidentiality concerns.[56]

By contrast a regionally integrated competition law enforcement system under a deep RTA may be capable of significantly reducing confidentiality concerns in relation to information exchange. The main issue regarding confidentiality has at least three dimensions: the wish of a competition agency to communicate confidential information with other agencies in order better to examine and duly punish anticompetitive conduct; the anxiety of the business community to protect business secrets; and protection of the legal right of those who stand to be adversely affected by the putative anti-competitive conduct. Obliging competition authorities to exchange confidential information and to

[53] (Turkish Competition Authority, 2006), pp. 5-6.
[54] Article 43 of the Turkey-EU Customs Union Agreement (e.g. Decision No 1/1995 of the EC-Turkey Association Council of 22 December 1995 on Implementing the Final Phase of the Custom Union)
[55] Articles 17 and 23 of the Agreement between EFTA States and Turkey [as amended by Joint Committee Decision No. 4 of 1996 (19 April 1996)].
[56] (Turkish Competition Authority, 2006), pp. 3-6. Consequently, the Turkish Competition Authority could not complete its investigations with respect to firms located outside Turkey. Although an Austrian company was found guilty of price fixing, since the investigation report could not be communicated to the headquarters of the respective company, the Turkish Competition Authority could not impose a sanction. See the decision of the Turkish Competition Board dated July 25, 2006 and numbered 06-55/712-202.

coordinate their enforcement activities alone would not be sufficient to relieve the several concerns. Parties should ideally develop a common understanding of the definition of '*confidential information*' and ensure that it is treated in a similar way across the entire region. Deep RTAs are well suited to harmonising confidentiality laws as part of a broader integration plan the parties envisage. Even in the absence of binding rules on competition enforcement, similar treatment of confidential information by the parties may partly diminish concerns about exchange of information by NCAs, and facilitate deeper cooperation. In the absence of a binding agreement, however, exchange of information will continue to be subject to national interest review of the parties on every occasion.

Regional integration of markets in deep RTAs may help to the collection of evidence located outside the borders of the regional bloc. As will be detailed below[57] creation of larger markets as a result of regional integration may increase the economic value of a regional bloc as a whole in the eyes of the TNCs. A connection can be observed between regional economic integration and increased trade activity within a regional bloc.[58] If so, higher (international) trade within a regional bloc may then increase the incentives of other jurisdictions to cooperate with the regional bloc in the investigation of international anti-competitive conduct, as the reciprocal benefits of cooperation would then be greater for both parties.[59]

Cost Efficiencies in Legal Enforcement

Reduced cost of legal enforcement is a key consideration, in particular for developing countries, when entering into a regional competition agreement. Savings from regional cooperation in enforcement may be operational and/or developmental of technical expertise.

Most developing countries suffer from the lack of sufficient financial resources for effective national competition law operation and enforcement, which is generally more expensive than that in many other legal fields. A workable competition law regime

[57] See the sub-section on 'Casting a Credible Threat against Anti-Competitive Behaviour' below.

[58] (Aggarwal, 2008), p. 4-5. Aggarwal summarises the findings of various empirical studies on the effects of RIA on FDI. He concludes that "*there seems to be unanimity that RTA-generated effects simulate FDI (at least do not dampen them)...*"

[59] When the role of a jurisdiction in global trade increases it may gradually acquire more data on international anti-competitive behaviour affecting other jurisdictions.

necessities not only adequate law and institutional design but also resources for market observance, on-site investigation, well-trained officials to undertake complex economic and legal analysis, and campaigns raising awareness of competition policy.[60]

As shown above, cooperation under *first generation agreements* is typically limited to exchange of non-confidential information and technical assistance from more advanced jurisdictions to their less advanced regional partners.[61] Such cooperation may bring substantial benefits to developing countries as well as to their developed partners. For instance, as a short-term gain, exchange of information on the techniques used in competition law enforcement may avoid duplication of efforts expended in collecting and assessing evidence across the NCAs of different jurisdictions. Moreover, in the long term, increased cooperation in a region might lead to closer convergence between national competition law regimes, and thereby may increase legal predictability and reduce the cost of compliance. However, as will be examined below, even a low level of regional cooperation may be burdensome to some developing countries due to the costs involved in information sharing and/or the receipt (or delivery) of technical assistance.

Cost efficiencies achieved under a *second generation agreement* may be more significant than those secured by first generation agreements, as the former usually include more detailed rules on the procedural steps of cooperation, and allow exchange of confidential information between the parties. Although the density of information exchange can lead to higher savings, actual cooperation under both groups of agreement may remain limited due to the cost of cooperation and the non-binding character of the respective agreements.

Deep RTAs that establish a regionally integrated competition law enforcement system may lead to the highest cost savings. This can be explained by the design of the competition law provisions in such agreements, and the resulting economies of scale in legal enforcement. From the institutional design perspective, regionally integrated competition law enforcement systems are designed mainly in three forms: (i) they may require the harmonisation of domestic competition law of the parties yet leave enforcement to the independent NCAs of the member states,[62] (ii) they may adopt common competition law and establish a regional competition authority exclusively for

[60] See (Gal, 2004).
[61] See also (Holmes et al., 2006), pp. 41-3.
[62] E.g. ANZCERTA.

competition cases with a regional dimension (i.e. cases concerning domestic markets of two or more member states),[63] or (iii) they may adopt common competition law and establish a one-stop shop regional competition authority for all (regional and purely-national) cases within the region.[64] Members of a regional bloc may choose to abolish NCAs if they exclusively authorise a regional competition authority for both purely national and intra-regional competition matters. That said, NCAs might also be preserved for the purpose of assisting the regional competition authority in the collection of evidence and the evaluation of local market dynamics in member states.

Even in the absence of a working regional competition authority, significant harmonisation of competition law across a regional bloc may notably improve regional cooperation in legal enforcement, as the similarities in domestic legislation of the parties would make correspondence between competition officers of member states easier, and similar procedural steps would largely alleviate concerns of delay in the collection of evidence and exchange of information.

On the other hand, the establishment of a regional competition authority may lead to significant cost savings on several grounds. Firstly, transfer of authority to review competition cases from NCAs to a regional enforcement body may prevent duplication of certain legal enforcement procedures across the NCAs of the regional bloc. In particular, regular correspondence between member states concerning actual enforcement cases may reduce the cost of evidence gathering. Secondly, legal enforcement by a regional competition authority or close cooperation between NCAs may reduce costs both of delivery and receipt of technical assistance in the regional bloc. Thirdly, the presence of a regional competition authority may lead to better coordination of competition advocacy among member states. As a result regional cooperation may reduce the cost of competition advocacy campaigns. Lastly, a regional competition authority with sufficient resources may be able to deal with more competition cases than poorly financed NCAs of its member states. This may, through

[63] E.g. EU, COMESA and CARICOM. Certain deviations might be possible. For instance, according to the regional competition law of the Andean Community, cases with a regional dimension are decided by a regional institution while those concerning the domestic markets of a single member state are decided by the NCA of the respective member state. In the early times of the CAN competition regime, however, member states that did not have national competition legislation were allowed to enforce regional competition laws directly until they adopted national competition legislation. See, (Botta, 2011), p. 20.

[64] E.g. WAEMU. Due to the difficulties the current institutional design of the WAEMU has caused, the member states of the WAEMU are working on a substantive reform of their regional competition law regime. For more information on this 3-year reform plan; see (UNCTAD, 2013c), pp. 8 and 11.

experience, contribute to development of expertise in competition law enforcement, possibly with less external training. Such experience may be sustained within a regional competition authority by right institutional government, and may achieve significant cost savings for the respective jurisdiction. In addition, stronger competition law protection in a regional bloc may bring some reputational benefits.

From a business perspective harmonisation of domestic competition law across a regional bloc and/or authorisation of a one-stop shop regional authority for merger (and/or other competition) review would ultimately reduce compliance costs of private and public companies.

Countering Anti-Competitive Conduct

A common characteristic of most developing countries is their small economies. This has consequences for the effectiveness of a competition law regime. The key implication of the 'big' market for competition law enforcement is its leveraging effect on the ability of competition authorities to impose deterrent sanctions against anti-competitive conduct.[65] By contrast, a small economy may mean the failure of competition enforcement bodies to impose deterrent sanctions on TNCs. In small economies consumer demand and accordingly trade potential for TNCs tend to be low for many sectors. As a result, when the NCA of a small economy imposes a significant fine on a TNC, the TNC may, if it is less costly than payment of the fine imposed, prefer to leave the markets of the respective jurisdiction altogether.

Such was the position of Microsoft Cooperation with regard to its supply of Hebrew supported operating systems to Israel. The Israeli authorities requested Microsoft to sign an agreement limiting its anticompetitive conduct in Israel. Although the terms of the proposed agreement were similar to those of the agreement Microsoft concluded with the EU, Microsoft refused Israel's request.[66] Since Microsoft's exit from the market would then have meant that the market for Hebrew supported operating systems would no longer be available, the Israeli authorities had limited power to insist on the agreement.[67]

[65] For a detailed analysis of the effect of small market size on competition enforcement, see, (Gal, 2002a).
[66] (Gal, 2009a), pp. 32-3.
[67] Ibid.

Another example is an international cartel investigation initiated by the Turkish Competition Authority in the seized coal market. In the seized coal market case, upon initiation of an investigation by the Turkish Competition Authority, one of the suspected firms closed its offices in Turkey without even waiting for the completion of the investigation.[68] As a result, the Turkish Competition Authority reported that it could not access any evidence of the suspected firm's infringement of competition law.[69]

The above two examples indicate that the size of an economy is directly related to (domestic) demand, and to the strategic importance of the respective economy in the eyes of private businesses. As the strategic importance of a market for private businesses increases, the responsible competition enforcement authority's power to impose deterrent sanctions increases as well.

When this positive effect is considered in the context of different levels of regional competition agreements, it is apparent that such reinforcing effect of regionally integrated competition law enforcement systems can hardly be replicated under a first generation agreement or a second generation agreement. In this respect *stand-alone competition agreements* are irrelevant, as these do not exercise any direct influence on the trade between the parties, and therefore do not affect the strategic importance of the domestic markets of the parties in the eyes of the TNCs. On the other hand, an RTA envisaging *only cooperation* between its member states might also promote the intra-regional trade. However, although an increase in the trade volume under a shallow RTA might leverage the strategic importance of the regional bloc as a whole for businesses, the positive effect it may have in strengthening the enforcement power of the NCAs is likely to be rather limited since the enforcement of regional competition policy would remain to be carried out domestically. By contrast, a regionally integrated competition law enforcement system under a deep RTA might achieve more significant benefits due to market integration, close regional cooperation in enforcement, and the decision-making power of the relevant regional competition authority.

[68] See (Turkish Competition Authority, 2006), p. 4-6. The decision of the Turkish Competition Board dated 25.07.2006 and numbered 06-55/712-202. See also around fn. 56 above.
[69] Ibid.

Increased Deterrence against International Anti-Competitive Conduct

Regional cooperation on competition law enforcement may also leverage the deterrence of competition authorities against international anti-competitive conduct. Neighbouring countries are more likely to enjoy similar natural resources and other factor endowments,[70] as well as similar consumer preferences. Such similarities combined with liberal trade policies may encourage TNCs to design their business activities with a regional perspective. This may include regional planning of anti-competitive practices.

A clear example of how firms can coordinate their anti-competitive activities regionally/internationally is the strategic alliance agreement of 2001 between the African beer business division of the Castel group and SABMiller.[71] According to the agreement SABMiller and Castel wanted to form an alliance by SABMiller's acquiring a 20% share in Castel's beer division, and Castel's acquiring a 38% share in SABI Africa by way of share exchange. Parties were operating in different geographical markets in Africa, and both were in dominant position in the beer markets of their own regions. The agreement was expected to give market access to both parties in African countries where they previously had no significant presence, but at the same time it allowed them to operate in their preferred zones without fierce competition from each other.[72] Although the agreement was not anti-competitive in any single African country due to the lack of geographical overlap between the preferred zones of the parties, the alliance would help them to preserve their market power within the entire region without facing competition from one another.[73]

In many cases it is not easy to inspect and condemn internationally organised anti-competitive activities like that in the above example. Currently, the prevailing model concerning competition policy is national enforcement. This means that, apart from a few economically -*as well as legally and institutionally*- strong jurisdictions like the US and EU, all jurisdictions can implement their domestic competition laws only within their geographical borders.[74] Furthermore, NCAs usually do not have the full knowledge of anti-competitive events taking place outside their national borders; and

[70] (Gathii, 2010), p. 580.
[71] (Jenny & Lewis, 2010).
[72] Ibid.
[73] Ibid.
[74] Due to the political tension extraterritorial enforcement of competition law raises, developing countries are generally not well equipped to address all international anti-competitive actions that they are aware of, even if their national laws embrace the *effects doctrine* (or a similar doctrine, such as the *implementation doctrine* adopted by the CJEU) for defining the scope of their competition jurisdiction.

due to difficulties in relation to investigation and collection of evidence outside their national borders, they are generally reluctant to prosecute cross-border competition cases.

Regional competition agreements can be helpful when they facilitate information exchange between NCAs. The influence of first generation agreements, however, is comparatively limited since the restriction on exchange of confidential information largely prevents cooperation between competition agencies in actual enforcement cases. Nevertheless, consultancy and technical training may be helpful to the parties to a first generation agreement in understanding the dynamics of certain types of international anti-competitive behaviour.

On the other hand, second generation agreements can be more effective in facilitating cooperation in specific enforcement cases. Depending on the terms of cooperation, exchange of confidential information may make detection of anti-competitive action, collection of evidence and assessment of the effects of anti-competitive behaviour much easier for the competition enforcement officers. In particular, notification requirements on actual enforcement cases may bring the existence of anticompetitive action to the attention of the agency receiving the information for the first time. Cooperation under a second generation agreement can be limited due to conflicting domestic interests of the cooperating parties. Because cooperation under a typical second generation agreement is essentially voluntary, actual cooperation in enforcement cases primarily depends on mutual trust between the parties, and convergence of their laws and operational procedures.

Lastly, regionally integrated competition law enforcement systems under deep RTAs may constitute the strongest group that can help to deter international anticompetitive behaviour in a regional bloc. As mentioned earlier, regionally integrated competition law enforcement requires consideration of the interest of the regional bloc as a whole, in contrast to the individual interests of member states. A regional competition authority would assess both national and regional market dynamics in its case investigations which may in return improve the detection and deterrence of international anti-competitive conduct.

Although it is true that the relevant market for competition law assessments should not be affected from the domestic borders of the responsible jurisdiction, in developing

countries, and in particular in young competition agencies, some reluctance can be observed to defining the relevant geographical market as broader than the domestic territory. Regional integration combined with a regionally integrated competition law enforcement system may improve the accuracy of the relevant geographical market definitions when the geographical market is actually broader than the territory of a single member state. Competition authorities can gain compliance with their decisions mainly by threatening two kinds of action. The first is a levy of execution on valuable assets of an anti-competitive firm that are located in the prosecuting jurisdiction. Secondly, in the absence of such assets, a competition authority may threaten to block the access of noncompliant firms to its domestic markets. Regional competition law enforcement accompanied by regional (economic) integration may provide regional competition authorities with a broader scope of sanction (in terms of both threats mentioned above).[75]

Increased Bargaining Power

A deep RTA may also contribute to regional competition law enforcement by creating increased bargaining power in international negotiations on trade. A deep RTA can serve its member states as a platform for creating a united voice in order to protect the joint interests of the region. In this case the regional bloc may be able to enter into agreements with other jurisdictions on more preferable terms than would be possible in agreements signed by individual member states.

The bigger market of a regional bloc -in comparison with each of its member states- may increase the interest of non-member jurisdictions to enter into a regional competition agreement with the regional bloc as the potential benefits of regional cooperation on competition is likely to increase in parallel with the volume of internal trade between the parties to the agreement. However, such a positive outcome is inevitably subject to economic development levels and commonalities in competition cultures as well as legal and institutional structures of the negotiating jurisdictions.

Leveraged bargaining power in international negotiation is also a direct result of joint regional interests due to economic integration, and therefore applies only to deep RTAs.

[75] (Sugden, 2002), p. 996.

Reduced Influence of National Vested Interest Groups and Daily National Politics

In addition to the above benefits, regional competition agreements may be useful in reducing the influence of vested interest groups and daily national politics on competition policy and its enforcement. Depending on the degree of corruption, vested interest groups in a particular jurisdiction may be able to influence the law-making process and/or case reviews before courts/competition authorities. Regional competition agreements may be helpful in levelling down this negative influence as and when they oblige signatory parties to adopt specific legislation or to pursue certain (concrete) policies at the domestic or regional level. When the obligatory harmonisation rules become more expansive, the scope for external influence may narrow. This potential benefit may apply to all types of regional competition agreement. But since first and second generation agreements usually involve only moderate harmonisation requirements (if any) and are typically non-binding, their effect in overcoming corruption might be inconsequential. In comparison with the first and second generation agreements the influence of regionally integrated competition law enforcement systems under deep RTAs in reducing the negative effect of vested interest groups over competition policy and enforcement might be more substantial since such deep RTAs require significant legal harmonisation and the transfer of certain legal enforcement powers to the regional level. Nevertheless, for all regional competition agreements the respective benefit is subject to social dynamics and level of corruption. With respect to deep RTAs, some interest groups might preserve their influence at the regional level as well. A deep RTA may itself encourage regional organisation of the vested interest groups in certain sectors as a result of which the pressure for protectionist policies may increase.[76] Presumably, this can be the case for industries in which the potential returns to vested interest groups are significant, and communication between anti-protectionist groups is weak. Likewise, even if regional competition law enforcement is partly cleared of the external influences, political tensions between the parties might still hamper the regional competition enforcement. The latter concern can be especially significant when the operations of a regional competition authority are subject to the approval of another regional body of a political nature.[77]

[76] (Bilal, 1998), pp.30-61.

[77] The CARICOM Competition Commission may be cited as an example. Its operations are largely dependent on the cooperation of the CARICOM Council for Trade and Economic Development, the latter being a political body. On CARICOM, see (Stewart, 2012) , pp. 180-1.

3.2.2 Costs of Regional Competition Enforcement

As shown above, regional competition agreements might substantially improve the efficiency of competition law enforcement in signatory jurisdictions. Reaping the benefits of regional competition agreements, however, usually necessities bearing the high cost of enforcement. Five categories of potential cost of regional competition agreements are examined below: (i) economic costs, (ii) sovereignty concerns, (iii) inter-states conflict, (iv) costs related to differences in national enforcement capacities and competition cultures, and (v) collective action problem in regional enforcement.

Economic Costs of Regional Competition Agreements

Cooperation under regional competition agreements is typically carried on by exchange of information and technical assistance. As the level of cooperation increases, competition agreements tend to require a level of harmonisation of national competition law and policies of signatories. Although such regulation can be useful in avoiding duplication of effort and therefore cutting expenses, regional cooperation itself is not cost-free. In addition to the costs accompanying the negotiation phase of a regional competition agreement, there are at least three major operational costs concerning regional cooperation in competition law enforcement. Firstly, exchange of information typically means regular costs to the parties the amount of which increases with the amount of shared information. Parties need to allocate a budget for the identification of the information that needs to be exchanged, preparation of the documents to be shared, and usually the examination, and in first generation agreements the omission, of confidential information, if any. It has been estimated that if a regional competition agreement requires an NCA to notify every single investigation that may affect the counterpart jurisdiction, at least five additional staff members are needed to deal with such notifications alone.[78] In addition, if parties use different languages, further costs will derive from translation of all documentation.

[78] (Rosenberg & Tavares de Araújo, 2005), p. 194. However, this number can clearly vary according to the overall workload and efficiency of an NCA.

Secondly, where a regional competition agreement requires a level of harmonisation of the national competition policies of the signatory parties there will be expenses concerning amendments to the domestic laws and institutional structures of the parties.

Lastly, regionally integrated competition law enforcement under a deep RTA inevitably entails significant costs deriving from the formation of new regional institutions, harmonisation of domestic competition law of the parties, and the regular co-operation between the national institutions of the member states. A regionally integrated competition law enforcement system under a deep RTA typically requires regular meetings between the member states in order to decide on regional competition policy and enforcement priorities. Moreover, in the presence of a regional competition authority, the respective body would need an additional budget for supervising the local practices of the NCAs of the member states, if any, and for ensuring the uniform enforcement of the regional competition policy across the respective regional bloc. In addition, regional competition law enforcement may entail significant transport costs, in particular, when the regional competition authority has exclusive competence to decide competition cases in the relevant regional bloc. Transport costs involved in the operations of the WAEMU Competition Commission exemplifies this situation.[79]

The economic cost of regional competition agreements totally depends on the actual level of cooperation. In this respect, when actively pursued, regionally integrated competition law enforcement systems under deep RTAs are likely to be more costly for the signatory states than first and second generation agreements.

Adoption of national competition law and NCAs can be especially problematic for developing countries with small economies. As noted above, competition law enforcement has high operational costs due to the nature of competition analysis. In most parts of the world implementation of competition law is mainly financed by allocations from government budget.[80] Accordingly, parliaments, ministers and/or governments usually have certain discretion over the budget of their NCAs. Developing countries that face budgetary restraints may be more reluctant to spare significant resources on competition policy due to other immediate needs of the public. In addition, in some developing countries, the lack of public support for the competition policy may further reduce the incentives of the governments to allocate the required budget to

[79] (UNCTAD, 2013c), p. 11.
[80] (OECD, 2003b), p. 03. (UNCTAD, 2008), p. 8-9.

competition policy.[81] Such budgetary implications of competition policy in developing countries may call for alternative funding mechanisms.

One alternative funding mechanism is the levying of fees for adjudication (e.g. notification fees, service charges). For instance, according to an UNCTAD study, the South African Competition Commission financed over 64% of its 2006/7 expenditure by fees it charged for its services.[82] However, such a budget resource is clearly subject to the number of competition cases decided in a given jurisdiction.[83] Newly established competition authorities can hardly expect service fees to be a significant contribution to their internal budgets.

Another alternative source of funding for competition law enforcement is the allocation of a portion of the fines collected by an NCA to the same NCA's budget. One bottleneck of such funding for developing countries is the limited ability of NCAs in small economies to impose deterrent sanctions against anticompetitive conduct.[84] Another point of concern is that a sanctions-based funding mechanism might give wrong incentives to competition agencies, distort their enforcement priorities, lead to corruption as well as inadequate accounting and control measures.[85] In practice, for the reasons mentioned above, a sanctions-based funding system is applied only by a small number of jurisdictions.[86] For instance, the NCA in Turkey was allowed to retain 25% of fines it had imposed on firms in the early years of its operation. However, the provision was annulled in 2003, presumably due to abovementioned reasons. A new provision was introduced in 2004, which allows the Turkish Competition Authority to collect a portion (i.e. 0.04%) of the capital of newly established joint stock and limited companies, as well as to collect the same portion of the capital increases in such types of business entity.[87] However, the contribution of such a funding mechanism to an NCA's budget is directly related to the amount of financial activity in (and therefore, the market size of) the jurisdiction. Some developing countries might be more cautious

[81] Ibid., p. 13-4.
[82] Ibid.
[83] Ibid.
[84] See Section 3.2.1 above.
[85] OECD (2003) (OECD, 2003b), p. 10; (UNCTAD, 2008), p. 14. In contrast, see (Sabbatini, 2009) – Sabbatini supports funding NCAs via the fines they impose.
[86] (UNCTAD, 2008), p. 9.
[87] Article 39 of the Turkish Competition Law; available in English at: http://www.rekabet.gov.tr/index.php?Sayfa=sayfaicerik&icId=165&Lang=EN (accessed on July 29, 2014).

in loading such burdens on private investors in order not to risk money flow into their economies.

Besides the above, developing countries may finance some of their expenditure by the support of external sources which have legitimate interest in having a harmonised competition practice in developing economies. For instance, some developed jurisdictions may like to have harmonised competition law and/or enforcement in developing countries for reducing the compliance costs of their national firms, especially by encouraging developing countries to have competition laws similar to their own. Such an influence can be traced to the development of regional competition policy in the Andean Community. The substantive competition law of the Andean Community was designed largely along the same lines as EU competition legislation as a result of a three-year project financed by the EU.[88] Alternatively, funding might be provided by a multinational organisation that works towards strengthening international trade and free markets.[89]

Sovereignty Concerns

A high level of regional cooperation on competition may cause loss of certain sovereign rights to the participating jurisdictions. When a regional competition agreement puts pressure on its signatories to amend their national law and policies and/or to change the design and duties of their national institutions, the agreement may effectively result in the transfer of certain sovereignty rights from national governments to regional bodies. The potential loss of sovereignty is greater for a regionally integrated competition law enforcement system under a deep RTA which obliges the parties to secure deeper cooperation. The loss of sovereignty for signatory parties of first and second generation agreements can be insignificant, due to the typically non-binding nature of these agreements. However, the literature offers some evidence of political pressure soft law instruments can put on national governments towards ensuring compliance. Soft law mechanisms for legal convergence under the leadership of certain multinational forums/organisations have proven to be efficient. The ICN, OECD and UNCTAD are

[88] See (Botta, 2011), p. 24-5. However, Botta criticises the EU, noting that the legal implant did not lead to efficient competition law enforcement in the Andean Community.

[89] However, developing countries would need to prove external funding bodies and/or developed jurisdictions that their genuine intention is to reform their competition laws, and that once substantial financial support is provided they have the necessary capacity as well as political dedication to achieve the long-term targets.

prominent examples of multinational platforms that adopt soft mechanisms to contribute to the development of a global understanding of certain competition concepts. One might conclude that as participation in voluntary platforms for competition increases, the pressure on nation states to comply with the guidelines and best practices suggested by such platforms increases as well.[90] This can be a function of global political trends and the fear of individual states of being left behind in the developments in the international arena.[91] Other reasons for states' compliance with soft law on competition may include the on-going interaction between the NCAs of different jurisdictions and, as a result of this, the development of similar thinking in dealing with competition matters. Another factor could be the intention of individual jurisdictions to develop a good international reputation. In line with the increasing influence of soft law mechanisms, there is also a growing literature acknowledging the solid influence of soft law on law making in sovereign states. Accordingly, it is suggested that soft law can actually limit sovereign rights to a certain extent.[92]

In light of the above it may be concluded that the actual degree of loss of sovereignty cannot only be determined by the contractual terms of competition agreements. Interference in sovereignty should rather be analysed in the context of the degree sovereign states feel themselves obliged to comply with a regionally or internationally imposed set of rules. For instance, the practical impact of a practice recommended by the ICN might be much higher than a loosely drafted RTA envisaging regional integration of competition law and enforcement. Nevertheless, on the assumption of political goodwill for the enforcement of a regional competition agreement and the existence of the necessary (national and regional) enforcement capacities, the costs to national sovereignty increase in proportion to the depth of cooperation between the parties. In this respect, a regionally integrated competition law enforcement system under a deep RTA can limit the sovereignty rights of the participating jurisdictions more than the limitations caused by a first or second generation agreement. On the other hand, however, the difference between the effects of first and second generation

[90] (D Daniel Sokol, 2008), p. 265-6.
[91] (Damro, 2006), p. 30.
[92] (D Daniel Sokol, 2008) around fn. 155, and the references therein. An example of the power of soft law instruments is the ICN Recommended Practices for Merger Notification and Review Procedures. According to the ICN, nearly two-third of its members have cited the respective recommendations when amending their merger laws. See (ICN, 2006), p.5.

agreements on loss of national sovereignty is likely to be minor due to their essentially voluntary nature.

A separate point concerning sovereignty can be assessed in the context of the role of competition policy in an increasingly globalising trade environment. As broadly acknowledged, free market theory anticipates abolition of all barriers to trade while strictly limiting government intervention to the economy. In this regard, it is expected that most market inefficiencies will automatically be corrected by way of free competition. Accordingly, one of the principal duties of a jurisdiction is the protection of competition in the market place. In this context, however, governments can use competition policy as a legitimate tool for interfering in free markets. This is because a parallel duty of governments is to implement policies promoting the smooth operation of public services. In addition, governments are expected to create and preserve a healthy trading environment (by having all legal, institutional and financial arrangements in place), and to provide economic support to certain strategic sectors in order to ensure economic stability and growth. Such public policies may often have restrictive effects on competition, and the power to balance these competing competition and (economic and non-economic) public policies usually belongs to the government (and to some extent, to the courts and other adjudicative bodies) of a given jurisdiction. The most straightforward form of interference by governments in trade is the provision of state aid to certain sectors. More indirect forms of interference can be found in tax law (e.g. regulation of tax advantages for certain sectors), laws introducing quotas and other trade restrictions (e.g. limiting the number of producers by requiring licences), international free trade agreements (e.g. exclusion of some goods and/or services from the scope of FTAs, thereby protecting local producers –sometimes to the disadvantage of consumers in downstream markets).

With respect to regional integration under deep RTAs, the influence of national governments over these strategic economic and non-economic public policies might become subject to regional review. This is clearly at a heavy cost of the sovereignty of participating national governments. That said, states may limit the scope of regional cooperation on competition to protect at least some of their strategic powers to regulate.

Presumably, due to similar concerns, state aid rules are excluded from the scope of some RTAs which include detailed competition provisions.[93]

Inter-State Conflict

Another limitation to the implementation of a regional competition agreement might lie in differences in individual interests, trade policies and legal enforcement traditions of the participating jurisdictions. These factors can lead to attribution of different goals to competition policy by different jurisdictions. In such situations, it could be especially difficult for a group of independent jurisdictions to agree on an intensive cooperation or joint enforcement model of competition policy.

Andrew Guzman conducted one of the most comprehensive studies of the effects of international trade on international competition agreements.[94] He suggests that the appropriate level of competition law protection in an independent jurisdiction need to be determined by considering the international trade activity of the respective jurisdiction. He argues that a jurisdiction which is a net importer of goods and services would like to have stricter competition rules which give more weight to consumer welfare. Contrary to this, a jurisdiction which is a net exporter of goods and services would aim to protect its producers over its consumers, and therefore adopt less strict competition policies. Guzman's claims are positioned in comparison to what he calls optimal global competition policy which favours total welfare standard (i.e. treating consumers and producers across the world equally).[95]

The above conclusions of Guzman are mainly based on jurisdictional limitations. Apart from a handful of agencies that enjoy the power of applying their competition laws extraterritorially, in most parts of the world the jurisdiction of a competition authority does not reach beyond the domestic territory of the relevant government. Furthermore, even if a jurisdiction enjoys extraterritorial enforcement power, competition authorities may *de facto* favour domestic firms and consumers over foreigners.[96] Likewise, no jurisdiction would base its competition policy on global welfare; and as a result of this, the interest of producers and consumers outside the territory of a competition agency

[93] Examples include MERCOSUR and NAFTA; see (Solano & Sennekamp, 2006), p. 20-9.
[94] (Guzman, 1998).
[95] Ibid.
[96] See (Guzman, 2007), pp. 429-30.

might not be considered in competition assessments.[97] Accordingly, jurisdictions may desire to achieve different competitive outcomes for cross-border competition law cases depending on their contrary domestic interests.

Independent of the choice between consumer and producer welfare as the goal of competition policy, if a jurisdiction is not an importer but only an exporter of a product, then any anti-competitive behaviour in the relevant product market would be investigated in the respective jurisdiction by considering only the producer surplus, if any (due to the absence of firms' market presence and consumer harm in the respective jurisdiction, it could as well be argued that no behaviour can raise competition issues).[98] Likewise, if a jurisdiction is not an exporter but only an importer of a product, then its competition reviews would exclusively focus on consumer surplus, and therefore the national approach would be an overregulating one in comparison to what Guzman's optimal global competition policy requires.[99]

A conflict may occur between the above two jurisdictions when two producers in the exporter jurisdiction would like to merge. Merger would strengthen the market power of the respective firms in the market of the importer jurisdiction. The exporter jurisdiction would not object to the merger on the ground that it would increase producer surplus while not causing any harm to consumer welfare due to the absence of merging entities in the domestic markets of the exporting jurisdiction. By contrast, the importer jurisdiction may like to block the merger on grounds of the increased market power of the merged entities and the potential loss of consumer welfare in its domestic

[97] However, this statement does not exclude the necessity of making welfare considerations on the basis of the relevant geographical market which can be defined broader than the relevant domestic territory depending on demand and supply. But a caveat needs to be made concerning the practice of young competition agencies in developing countries; see the sub-section entitled 'Increased Deterrence against International Anti-Competitive Conduct' above – those competition agencies tend to define the relevant geographical market within their domestic territories.

[98] The exclusion of export cartels from the scope of US anti-trust law's application under the Webb-Pomerence Act is consistent with the above line of argument. Similar exclusions can be found in the law of other jurisdictions (and in both developed and developing economies).

[99] (Guzman, 1998), p. 1512-3. A similar point is made by Ezrachi who examined welfare transfers on the basis of different national competition policy goals in an international context. Ezrachi notes that different goals of enforcement may lead to '*cross-border transfer of wealth*' from domestic markets to foreign markets and vice versa. Ezrachi also suggests that the presence of cross-border transfer of wealth may create disincentives to entering into regional competition agreements, or cooperating jurisdictions may exert similar externalities as a group on non-members. See, (Ezrachi, 2013).

markets.[100] A similar conflict can also be observed when both jurisdictions accommodate a percentage of the production and of the consumption.

Assume that jurisdiction A is the net importer of a good while jurisdiction B is the net exporter of the same good. Jurisdiction A would like to block a merger that would lead to higher profits for producers and reduce consumer welfare; whereas the jurisdiction B would prefer to approve the same merger.[101]

It can be deduced from Guzman's article that when international trade in imperfect markets is considered countries that are in the position of net exporter are likely to be better off if they embrace lax competition policies. Accordingly, the opposite would be true for net importer countries.[102]

Without prejudice to the above, Guzman adds another dimension to his assessments and examines the effects of the ability to enforce national competition laws extraterritorially on competition policy preferences of individual jurisdictions. He notes that jurisdictions that can apply their competition laws extraterritorially will do so in line with the above assertion without necessarily carrying an intention to enter into a bilateral or multilateral agreement aiming to create a platform for intensive cooperation on competition law enforcement.[103]

On the other hand, jurisdictions which cannot apply their competition laws extraterritorially would be those which can benefit most from an international competition agreement, since they would be able to deter international anti-competitive behaviour only by way of an international agreement. However, when such a jurisdiction is a net importer and implements stringent competition policies, then the strict rules would become increasingly burdensome for its national producers while remaining ineffective for foreign firms engaging in most forms of international anticompetitive behaviour outside the domestic borders of the respective jurisdiction. On this basis Guzman concludes that in order to protect their national businesses net

[100] The above example can be simplified by considering a two-country world where one country accommodates the entire production of a given product for which there is no domestic demand. All production is exported to the other country, which is not a producer of the respective product. See (Sugden, 2002), p. 994.

[101](Guzman, 1998), pp. 1518-21.

[102] For the purposes of the above statement, 'net importers' represent countries which produce less than they consume. Accordingly, 'net exporters' represent countries which produce more than they consume. See ibid., pp.1517-6.

[103] However, these jurisdictions might be persuaded to enter into such international agreements in return for provision of some concessions by other jurisdictions (such as transfer payments or favourable trading conditions).

importer jurisdictions that are not able to implement their domestic competition laws extraterritorially would prefer to adopt less restrictive competition policies.[104] In other words, jurisdictions which cannot enforce their competition laws extraterritorially would have less strict competition policies than the optimal global competition policy.

However, Guzman does not exclude that deviations from his above conclusions might occur when competition laws also aim to achieve non-economic policies,[105] or when political considerations of governments play a role in the legal design and/or enforcement of domestic competition policies.[106]

Guzman's work has been very useful to understanding the economic dynamics of international competition policy negotiation.[107] However, his conclusions stated above are not fully applicable to all situations. Although it is true that NCAs, as well as regional competition authorities may have a tendency to favour local firms and consumers over foreigners in their competition assessments, a country's overall trade balance might not have such a direct influence on the welfare standard embraced in a domestic competition policy. This might be explained on various grounds. Firstly, as acknowledged by Guzman, public choice considerations may lead to pursuance of unconventional economic and non-economic objectives in competition policy and therefore reshape competition law enforcement. Secondly, fast growth in international trade may obstruct the necessary calculations required for such policy design. Today most product markets involve numerous firms from numerous countries. Due to this cosmopolitan structure of most product markets, making reliable estimations on the right level of rigidity of a competition policy for increased profitability might be a big challenge. Lastly, trade balances of countries may change over time, and it might not be desirable to change the welfare standard applied in an established competition practice accordingly. Consequently, designing competition law and policy on the basis of fairness, and the role attributed to the competition law and policy within the targeted social order might be more appropriate.

[104] See (Guzman, 1998), pp. 1523-4.
[105] Ibid. pp, 1511-2.
[106] Ibid, pp. 1529-31.
[107] Guzman's work has been widely cited in the recent literature; in particular by those who accept Guzman's conclusions, including (Sugden, 2002), (Gal, 2010b), and (Gal & Wassmer-Faibish, 2012). By contrast, Waller explains the different approaches of independent jurisdictions to competition policy by bureaucratic political concerns; see (Waller, 1997), pp. 343-404.

Nevertheless, in light of the above, it may be concluded that inter-state conflict in relation to regional competition enforcement may occur mainly on two vertical levels: (i) jurisdictions which aim to enter into a *deep* regional competition agreement may find it difficult, if not impossible, to reach a consensus on the goals and rigidity of a regional competition policy, and (ii) different goals of domestic competition policies may lead to regional conflict in the simultaneous reviews of competition cases by independent NCAs of the participating jurisdictions.

Limitations to the scope of regional competition law enforcement or a careful selection of regional cooperation mechanisms may partly relieve the costs that may derive from inter-state conflict.[108] Especially when there are various technical, financial and political obstacles to the adoption of an effective regional competition policy, participating jurisdictions may wish to cooperate on voluntary terms, or to limit the scope of their cooperation to exchange of non-confidential information and/or provision of technical assistance (i.e. first generation agreements). When countries intend to involve more intensive forms of regional cooperation they might prefer to limit the scope of regional competition enforcement to areas that are to the mutual benefit of all parties (such as the so-called 'plain vanilla' international cartels).

In regionally integrated competition law enforcement systems under deep RTAs different welfare implications of regional competition law enforcement might lead to political tension within a regional bloc. Intra-regional transfer payments from advantaged member states to their negatively influenced counterparts may be helpful in removing such political tension.[109] Transfer payments are not required to be in the form of direct transfer of money. Rather, compensation is more likely to be agreed upon if it can be made under other economic or non-economic policy areas integrated in a deep RTA.[110] Nevertheless, the difficulty of calculating the appropriate amount of transfer payments remains;[111] likewise political tension any form of regular transfers creates in the long run.

[108] (Guzman, 1998), p.1545-6; (Gal & Wassmer-Faibish, 2012), p. 302-3; and (Gal, 2010b), p. 252-4.
[109] Ibid.
[110] (Guzman, 1998), (Gal, 2010b).
[111] Ibid. On the difficulty of direct wealth redistribution, see Chapter 4, around fn. 94-7.

Inter-state conflict may arise in different forms under different types of regional competition agreements. Diverse strategic interests[112] and competition policy goals of cooperating jurisdictions are likely to lead to the obstruction of actual cooperation under first and second generation agreements. In other words, since cooperation takes place only voluntarily under these two forms of agreement, the main effect of inter-state conflict is the avoidance of cooperation in specific enforcement cases.

With respect to regionally integrated competition law enforcement systems under deep RTAs, inter-state conflict may lead to at least two kinds of negative effect. Firstly, differences in the perception of the goals of competition policy may result in serious delay in the drafting of primary and/or secondary legislation on regional competition law and regional institutions. Inter-state conflict may cause substantial delay in the establishment of a workable regional competition enforcement system, or may lead to abandonment of competition provisions of the relevant RTAs.

Secondly, a regionally integrated competition law enforcement system under a deep RTA may require a regional competition authority to balance conflicting domestic interests of member states.[113] The potential effect of such conflicts is closely related to the robustness of regional competition laws, as well as to the presence of intra-regional transfer mechanisms. In cases of inter-state conflict under regionally integrated competition law enforcement systems in deep RTAs, the first point of concern is whether the division of competence between the regional competition authority (and other regional adjudicative bodies) and the NCAs (of the participating jurisdictions), as well as between the NCAs themselves is clearly regulated. In the absence of clarity in the respective regional laws, conflicts can increase, and may significantly risk the operability of regional competition authorities. Inter-state conflict might also be carried further at a political level, if regional enforcement ultimately causes a welfare loss in one or more member states while leading to a welfare gain in others. In such a case the presence of compensating transfer payments to disadvantaged member states under the relevant RTA gains more weight. As mentioned above, such transfers need not be relevant to competition policy and enforcement. Total absence of balancing mechanisms

[112] These include the clashes concerning independent producer welfare and/or consumer welfare considerations.
[113] Balancing may also extend to cases involving conflicting interests of some member states and regional institutions.

in a regional bloc, however, may risk the very existence of regional integration in the long term.[114]

Differences in National Enforcement Capacities and Competition Cultures

In addition to the above, different enforcement capacities, competition cultures, and legal and institutional structures of individual jurisdictions may significantly hinder the efficiency of regional competition agreements. Such differences may create at least three major difficulties concerning the prospects of a regional competition agreement. Firstly, in terms of *regional politics*, such differences may lead to imbalances between the actual contributions of the parties to regional cooperation. This might reduce the benefits of regional cooperation for some or all parties, and might adversely affect the motive for further cooperation. In addition, regional financial and technical resources may need to be allocated differently among the parties, if applicable. Substantial differences in regional resources allocated to individual parties may also lead to political tension.

Secondly, as regards *law-making*, differences in competition culture, legal tradition and perceptions of core competition law concepts may prevent smooth cooperation between the parties during negotiation of the terms of a regional competition agreement.[115] For instance, the different definitions of the term 'dominance' in the national law of the member states of the WAEMU apparently led to a problem in reaching a consensus on the definition of the term in the regional competition law of the union.[116] In such cases promoting constant dialogue between the NCAs of the participating jurisdictions seems to be the necessary initial step before reaching a common understanding on the core competition concepts and the objectives of regional cooperation.

Thirdly, with respect to *legal enforcement*, lack of an adequate legal environment and institutions may obstruct the enforcement of regional competition policies, the receipt and/or provision of technical assistance, the success of competition advocacy campaigns, etc. Improvement of legal and institutional structure of all parties, however, can be a very challenging task requiring long-term strategic planning as well as

[114] The next chapter will examine this issue in more detail.
[115] (Guzman, 1998), p. 1540.
[116] Gal (2012), p. 306.

significant financial resources depending on the development level of the cooperating jurisdictions.

In relation to first and second generation agreements the above-mentioned problems would mainly reflect on the actual cooperation between the parties. Since cooperation is essentially voluntary under these two kinds of agreement, independent jurisdictions can freely decide on their commitments at all times. On the other hand, however, such differences typically reduce the incentives for the parties to conclude a second generation agreement from the outset.[117]

The negative influence of different enforcement capacities and competition cultures of the parties can be more substantial under regionally integrated competition law enforcement systems in deep RTAs. As deep RTAs envisage long-term integration in various policy areas the success of such agreements is mainly dependent on constant co-operation and good performance by member states.

As mentioned above, a regionally integrated competition law enforcement system under a deep RTA may require co-existence of the NCAs of member states and the regional competition authorities, or it may abolish the NCAs and give an exclusive decision-making power to the regional competition authorities for all competition law cases across the region. In particular, in the case of shared enforcement competences between the NCAs and regional institutions, the success of regional enforcement is clearly dependent on the good performance of all national and regional competition authorities. That said, even for deep RTAs in which regional competition authorities hold exclusive competence for decision-making, contributions of member states to the competition enforcement process is still necessary for the success of regional enforcement. Such cooperation on the part of member states may include, *inter alia*, collection of case relevant materials, competition advocacy and execution of decisions taken by regional competition authorities. The experience of the Caribbean Community (CARICOM) in regional competition law enforcement can be cited as an example. Regional competition law in CARICOM is largely informed by EU competition legislation. However, CARICOM countries are more reluctant than the EU member states to surrender their sovereignty rights and as a result the CARICOM Competition Commission has not been given complete autonomy in administration and implementation of CARICOM

[117] See Section 3.1.1 above.

competition law under the CARICOM agreements. As mentioned earlier, according to Articles 175 and 176 of the Revised Treaty of Chaguaramas, the CARICOM Competition Commission is obliged closely to cooperate with the NCAs of member states in the preliminary investigation stage.[118] On this ground, possible deficiencies in the national competition proceedings of CARICOM member states directly influence the efficiency of regional competition law enforcement by the CARICOM Competition Commission.[119]

Most developing country governments duly acknowledge their capacity constraints in relation to domestic competition law enforcement. Therefore, developing countries have been particularly reluctant to enter into binding regional/international agreements that would require good performance of their NCAs. Accordingly, although there are plenty of deep RTAs with competition policy provisions, the respective provisions are typically excluded from the existing dispute resolution procedure under the respective agreements.[120]

Collective Action Problem in Regional Competition Enforcement

A further problem peculiar to regionally integrated competition law enforcement systems under deep RTAs may arise in relation to individual profit maximising behaviour of member state governments.

'*Collective action theory*' was first modelled by Mancur Olson[121] in order to explain the '*public goods*' concept. Public goods are defined as those that are inevitably open to the use of all parties once produced, such as clean air, national defence, and publicly available academic works. According to the theory, individual parties have minimal interest in contributing to the production of public goods, but instead expect others to

[118](Stewart, 2004b), p. 5-6.
[119] Such stringent rules on cooperation between regional and national competition authorities can limit the operability of regional authorities if NCAs refuse to cooperate for political or other reasons.
[120] See (Teh, 2009), p. 482-3. Teh demonstrates that: "*Out of fifty-five RTAs with specific competition provisions, fourteen go on to exclude all these provisions from dispute settlement while another two excludes parts of competition provisions from dispute settlement. (...) All fourteen RTAs with complete carve-outs include at least one developing country member.*" Sokol makes a similar observation in relation to Latin American regional integration agreements: '*The empirical study's most interesting finding is that competition policy chapters lack dispute settlement while other similar chapters have them*' [(D Daniel Sokol, 2008), p. 262-3].
[121] (Olson, 1965).

undertake the burden of production while wishing thereafter to enjoy a free ride from the benefits of public goods.

An intensive form of regional competition law enforcement may show similar externalities.[122] For instance, when decision-making authority on competition law cases is transferred from the NCAs of member states to a regional competition authority under a deep RTA, the existence of the regional competition authority will be to the benefit of all member states within the regional bloc once it is established and operational.[123]

Externalities deriving from collective action theory might be avoided by explicitly regulating the scope of the participation duty of all member states, and also by introducing an adequate monitoring and dispute resolution mechanism in order to ensure compliance. However, Croley (2008) points out that the application of sanctions or other selective instruments within a group in order to overcome the collective action problem also suffers from the very same weakness that observation of the actions of group members as well as implementation of any form of sanction themselves constitute a '*public good*' in the sense of Olson's collective action theory.[124]

However, unlike Olsen, Croley has more confidence in the regulatory government and sets forth three reasons why a public good can nevertheless be produced continuously[125]:

i. Individual members of a group may be motivated to contribute to a group good (i.e. public good) in response to '*moral considerations*';

ii. The benefits of participation itself may motivate the contributor to a group good; and

iii. Groups may be organised by political entrepreneurs who receive a different sort of private benefit from the act of providing a group good (e.g. gaining voter sympathy).

All three reasons stated by Croley may be applicable to the public good nature of regionally integrated competition law enforcement systems in deep RTAs. Contribution to the production of a public good for purposes of moral considerations obviously

[122] (Gal & Wassmer-Faibish, 2012), pp. 309-10.
[123] However, some member states might accommodate more competition disputes and therefore might benefit from regional competition law enforcement more than other member states.
[124] (Croley, 2008), p. 29-36.
[125] Ibid.

depends on local culture and the contemporary as well as historical relationship between the nations.

In accordance with the second point above, some members of a group may agree to make higher or exclusive contribution to the public good because of comparatively higher benefits they expect to get from it. The same might apply to regionally integrated competition law enforcement under deep RTAs. Distinct interests of the parties concerning regional competition law enforcement might be possible to estimate in regional competition agreements, for instance by examining the number and economic value of cases affecting each member state. In these situations member states especially which have lower interest in the presence of a workable regional competition law enforcement system might expect other member states to bear all or a large percentage of the costs of the regional competition law enforcement regime. Despite the imbalances in financial contributions of member states to regional competition law enforcement, however, parties may like to keep the regional competition law regime operational. This might be the case when more advantaged member states are (economically) better off due to the regional competition law enforcement despite bearing a higher percentage or all of enforcement costs.

The third point suggested by Croley can be explained by the *public choice theory*. Politicians might have personal interests in pursuance of certain policies that require international cooperation. In addition, member states of a deep RTA and their domestic governments might wish to comply with *regional* competition law not only for the sake of the competition policy itself, but also in order to protect the other interests they might have in the broader economic (and social) integration under the same RTA. Furthermore, the politicians might use their obligations under an RTA as an excuse for adopting unpopular policies against the desire of their constituencies.[126]

The collective action problem concerning a regionally integrated competition law enforcement system is likely to be more significant at the early stages of regional cooperation. The parties to a deep RTA may reap the benefits of regionally integrated competition law enforcement only after the establishment of a workable legal and institutional system in the respective region. As shown above, for deep RTAs the establishment of such a system may require, *among other things*, legal reform,

[126] See Section 4.4.7 in Chapter 4 below.

establishment of new national and regional institutions, and reform of the existing institutions of member states. Therefore the incentives of member states of a deep RTA to finance the early stages of a working regional competition law enforcement system might be significantly lower, as the early stages are likely to involve high sunk costs with no or minimum immediate returns. This problem can be more significant for developing countries with tight national budgets. It is believed that only *well-planned* foreign aid might be helpful to address this difficulty faced by significantly resource-constrained developing countries.[127]

3.2.3 Assessment of the benefits and costs of regional competition agreements

The above discussion might suggest that the potential benefit of a regional competition agreement may increase in parallel with an increase in the depth of cooperation between the parties. However, as can be seen from the competition agreement between New Zealand and Australia, the actual gains from a regional competition agreement largely depend on the level of cross-border trade within the region, coherence in the law and institutional traditions of the parties, and political willingness of the national governments to cooperate.

The competition agreement between New Zealand and Australia is technically second generation.[128] However, the actual cooperation between the parties is closer and more efficient than many other regionally integrated competition law enforcement systems under deep RTAs. The regional competition agreement between New Zealand and Australia indicates that the parties found deep cooperation in competition law enforcement desirable, given their highly integrated markets, harmonised business law, and the similarities in their national competition law proceedings.[129] This implies that the respective second generation agreement is actually a natural extension of the economic integration agreements between the parties [i.e. the 1965 New Zealand - Australia Free Trade Agreement (NAFTA), followed by the 1983 Australia – New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)]. Secondly, although the agreements between the parties do not explicitly oblige them to harmonise

[127] On the importance of timing and conditions of international aid, see (Collier, 2007).
[128] Cooperation Agreement between the New Zealand Commerce Commission and the Australian Competition and Consumer Commission in Relation to the Provision of Compulsory-Acquired Information and Investigative Assistance, April 19, 2013.
[129] Ibid., paragraphs 3-4. On the close relationship between the two countries, see (Round, Tustin, & Round, 2005).

the substantive competition provisions in their national law or to establish a regional body to supervise each other's enforcement activities, over time the parties have significantly harmonised their national competition law voluntarily in order to strengthen the trans-Tasman businesses.[130] Soft harmonisation of their law, similar enforcement capacities of their NCAs, and the strong business ties between their economies has made the NCAs of New Zealand and Australia natural strategic partners. Although it is true that the national interests of the parties still set the limits of regional cooperation, due to their widely overlapping commercial interests the parties seem to work very closely and efficiently in administering their competition law enforcement.

A general implication of the relationship between Australia and New Zealand is that, given political goodwill and sufficient level of advancement in law enforcement, second generation agreements can also facilitate deep and efficient regional cooperation in competition law enforcement. Therefore potential costs and benefits of a regional competition agreement should be considered mainly on the basis of the specific relationship between the parties rather than solely on the terms of a regional competition agreement and the extent of cooperation envisaged therein. However, in any case the above sub-sections demonstrate that for efficient regional cooperation in competition law enforcement, parties *must* have a common understanding of the core competition concepts, similar substantive competition law and procedure, and mutual trust in each other's national legal enforcement practices. In addition, the efficiency of legal enforcement of any national or regional arrangement is essentially subject to parties' respect of the rule of law, political goodwill, adequate laws, and institutions with sufficient (financial, technical and human) resources.

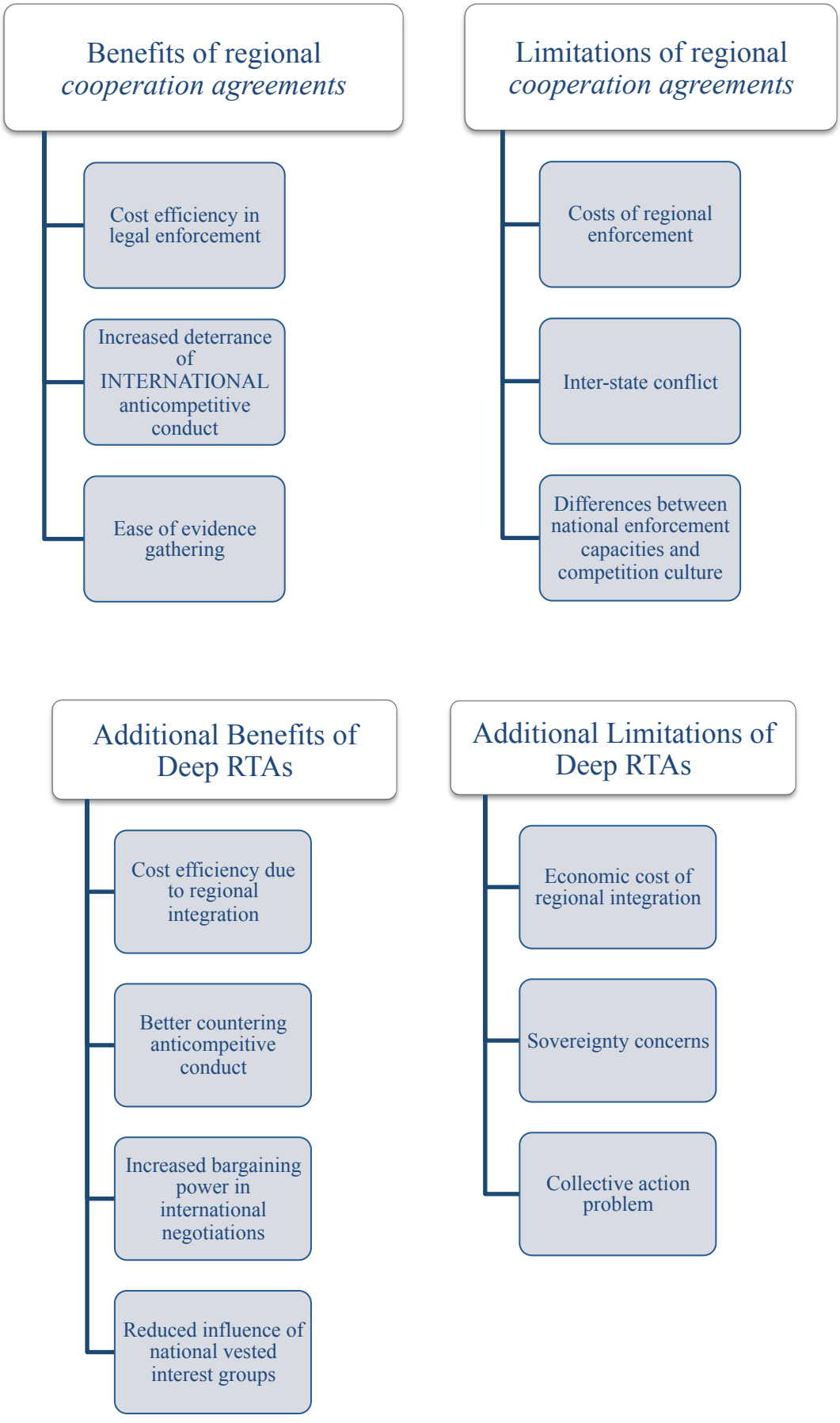
The above sections also demonstrate that the tools required for cooperation in competition law enforcement are mainly the same for all levels of regional competition agreement. Accordingly, in line with the OECD Recommendations,[131] regional cooperation may take place via notification requirements, exchange of information, coordination of action, consultation and conciliation. The terms of a regional competition agreement and the extent of actual cooperation between the parties, however, is determined by the confidence of the parties in the fulfilment of the above-mentioned prerequisites of deep regional cooperation.

[130] Harmonisation took place mainly on the basis of MoUs signed by the parties. Ibid.
[131] (OECD, 1995).

Second generation agreements are typically signed and enforced by developed jurisdictions with established domestic competition law practices. The absence of effective second-generation agreements between developing countries can be explained by the lack of above-mentioned prerequisites for deep regional cooperation between most developing countries.

The previous two sections have also shown that a major difference between regional *cooperation* agreements and regionally integrated competition law enforcement systems in deep RTAs concerns the objectives of regional cooperation. While cooperation agreements are drafted with the sole intention of facilitating cooperation between independent jurisdictions, deep RTAs establishing regionally integrated competition law enforcement systems carry the additional aim of strengthening regional economic (and social) integration. Since the competition policy of each of the parties to a *cooperation* agreement continue to be designed and enforced domestically, these agreements can have only a limited effect in enhancing domestic competition law *enforcement capacity* of their signatory jurisdictions. Regional *cooperation* agreements mainly aim to make identification and deterrence of anti-competitive conduct easier for each of the participating jurisdictions, and to ensure efficiencies in the cost of legal enforcement where possible. On the other hand, the above discussion suggests that *regionally integrated competition law enforcement systems in deep RTAs* may have an additional target of the improvement of individual competition *enforcement capacities* of their member states. Deep regional cooperation in competition law enforcement might be achieved between developing countries via deep RTAs to the extent that they can remove the obstacles faced by developing countries in legal enforcement due to their development level. Nevertheless, as shown above, deep RTAs require higher economic and political commitment from member states than the level of commitment required by regional cooperation agreements on competition enforcement.

In light of the above, the next section discusses when and under what conditions regional competition agreements can address specific problems faced by developing countries in competition law enforcement.


Benefits of regional cooperation agreements
Cost efficiency in legal enforcement
Increased deterrance of INTERNATIONAL anticompetitive conduct
Ease of evidence gathering
Limitations of regional cooperation agreements
Costs of regional enforcement
Inter-state conflict
Differences between national enforcement capacities and competition culture
Additional Benefits of Deep RTAs
Cost efficiency due to regional integration
Better countering anticompeitive conduct
Increased bargaining power in international negotiations
Reduced influence of national vested interest groups
Additional Limitations of Deep RTAs
Economic cost of regional integration
Sovereignty concerns
Collective action problem

Section 3.3 Meeting the Specific Needs of Developing Countries in Regional Competition Agreements

Regional competition agreements might be helpful in addressing some common problems of developing countries concerning competition law enforcement, such as problems deriving from lack of resources, low competition awareness, small-sized economy, strong vested interest groups, inadequate legislation, and dysfunctional institutions.

A major obstacle to the efficiency of competition law enforcement in developing countries is the lack of financial resources. As shown in previous sections regional cooperation in competition law enforcement can bring significant cost savings, especially when the cooperation includes exchange of confidential information between the parties. In addition, harmonisation of competition law of the parties is identified as an important facilitator of regional cooperation, and thereby more cost efficient competition law enforcement. Depending on the actual level of cooperation between the parties, regionally integrated competition law enforcement systems in deep RTAs might achieve the highest cost savings in the long term since an integrated structure requires closer legal harmonisation,[132] and may thereby eliminate most of the duplicated law enforcement activities across the respective regional bloc. As mentioned in the previous section, however, soft law mechanisms for legal harmonisation and coherent enforcement may not be suitable for developing countries due to problems of political economy and underdeveloped legal systems of the respective jurisdictions. Regionally integrated competition law enforcement systems may also provide a better platform for the coordination of competition advocacy campaigns of the cooperating parties, and thereby also reduce the cost of law enforcement.

Limited human resources constitute another common problem of many developing countries. All types of regional competition law agreements might achieve significant improvement through cooperation in the form of training and technical support. Second generation agreements and regionally integrated competition law enforcement systems in deep RTAs, however, may also partly reduce the problems faced in actual

[132] A recent OECD/ICN survey of international cooperation on competition has shown that legal constraints (e.g. differences in legal systems and incoherent domestic legislation) constitute a bigger obstacle to the efficiency of regional cooperation than practical constraints (e.g. scarce resources, timing and language differences). See (OECD, 2013), p. 85. Moreover, the parties of a deep RTA would presumably be more willing to undertake significant legal reform as they would envisage (and be ready for) more sophisticated forms of cooperation on various policy grounds, and accordingly expect higher benefits from the greater scope of regional cooperation.

competition law enforcement processes if they realise exchange of confidential information between the parties. Although the closeness of actual cooperation between the parties would be the main determinant of the effectiveness of any regional competition agreement, extensive cooperation in various policy areas under a deep RTAs may play a key role in encouraging developing countries actively to cooperate in competition law enforcement as well.

Another important obstacle to the success of competition law enforcement in developing countries is corruption. In many developing countries the rule of law is not yet established and certain vested interest groups and/or politicians continue to be able to influence the judiciary. Regional competition agreement may put national governments of member states under pressure to comply with the regional and/or national competition policies. In regionally integrated competition law enforcement systems in deep RTAs this positive pressure can be more significant than in first and second generation agreements, as compliance might then be ensured by binding regional rule, observed by a regional institution, and might be made subject to direct or indirect sanction (e.g. trade remedies). In addition, as noted above, in the presence of an operational regional competition authority, the influence of vested interest groups and local politicians on the administration of regional competition law and enforcement might be less powerful. As regional *cooperation* agreements on competition law enforcement do not primarily aim at improving legal enforcement systems of the signatory parties, these agreements are less likely to remove corruption in developing countries' administration of competition law.

Lack of financial and human resources as well as deficiencies in legal proceedings in developing countries usually lead to weak or inoperative institutions. Regional competition agreements may help to relieve these problems to the extent they can provide technical assistance and guidance on best practices. The additional positive effect of regionally integrated competition law enforcement systems in deep RTAs may derive from the establishment of a regional competition authority. This might help to remedy problems of institutional design as it would undertake all or a part of the enforcement activity within the respective region and provide long-term guidance to the NCAs of the member states, if any.

Lastly, as mentioned above, the size of an economy directly influences the power of competition agencies to deter anti-competitive TNCs. It is not regional cooperation in

competition law enforcement but regional economic integration which may be helpful in strengthening the ability of competition authorities of small-sized economies to impose deterrent sanctions.[133] The same applies to reduced influence of domestic vested interest groups and improved bargaining power of regional blocs in international trade negotiations following the conclusion of a deep RTA. Accordingly, these benefits can only be gathered from a regionally integrated competition law enforcement system under a deep RTA.

The above discussion suggests that regionally integrated competition law enforcement systems under deep RTAs might be better suited to addressing the specific problems of developing countries in competition law enforcement, although administration of deep RTAs always involve much higher costs, including that of national sovereignty.

In line with the above, one may safely conclude that the achievement of the above-mentioned benefits of regionally integrated competition law enforcement systems is subject to the presence of deep integration under a RTA, and a corresponding regional competition policy that receives political backing from member states. The viability and effectiveness of a regionally integrated competition law enforcement system in a deep RTA is conditional on the positive prospect and sustainability of the broader regional economic (and social) integration design, and coherence between the regional competition policy and the other regional integration policies pursued under the respective RTA. This issue will be investigated further in the following chapters.

Section 3.4 Conclusions: Cooperation versus Integration

The main purpose of this chapter was to examine the potential benefits and costs of regional competition agreements from the perspective of developing countries. Different types of regional competition agreement are identified mainly by focussing on the depth and goals of regional cooperation in competition law enforcement. Concerning the goals of regional competition agreements it is suggested that a

[133] Although in theory NCAs of independent jurisdictions may agree to give a collective response against an anti-competitive behaviour in one party's territory, in practice there is very little prospect for such form of cooperation. Because sanctions imposed on a TNC for its unlawful behaviour in another territory is likely to influence the national markets of the original jurisdiction negatively. For example, seizing an anti-competitive firm's assets can potentially lead reduction of the firm's market activity in the cooperating jurisdiction and therefore, adversely affect its national economy. Likewise, the anti-competitive firm might be the national of the cooperating jurisdiction. Alternatively, a sanction which forces or encourages the firm to exit the cooperating jurisdiction's market can be undesirable due to market concentration.

distinction be made between regional *cooperation* agreements on competition law enforcement, and *regionally integrated competition law enforcement systems* in deep RTAs. A principal difference is that while regional cooperation agreements aim to make the detection and sanctioning of anticompetitive actions easier for each of the participating jurisdictions, regionally integrated competition law enforcement systems in deep RTAs aim to achieve an additional objective of strengthening broader economic (and social) integration between the parties. With respect to the depth of regional competition agreements, a division was made of regional cooperation agreements into two groups according to whether the agreement permits parties to exchange confidential information. This distinction is appropriate as only the exchange of confidential information can promote effective cooperation in actual competition law enforcement cases.

Examination of the potential benefits and costs of regional competition agreements has shown that, assuming sufficient political will and enforcement capacity, the deeper the level of cooperation between the parties, the higher the potential benefits they can accrue from the regional competition agreement. Accordingly, regionally integrated competition law enforcement systems in deep RTAs are better suited to address the problems of developing countries concerning competition law enforcement. As certain outstanding aspects of these deep RTAs actually derive from regional economic integration, the respective benefits cannot be replicated in a stand-alone competition agreement.

Another implication of the positive effect of regional economic integration on regional competition law enforcement is that the success of a regionally integrated competition law enforcement system under a deep RTA is subject to the workability of broader regional economic (and social) integration under the same RTA. Therefore effective regional cooperation in competition law enforcement under a deep RTA requires firstly the presence of a workable regional economic (and social) integration design, and secondly, a regional competition policy that corresponds to the broader integration envisaged under the respective RTA.

The next chapter will examine the reasons for independent jurisdictions to enter into RTAs. It will discuss the role of competition policy in deep regional integrations, and the factors that may affect the success of a regionally integrated competition law enforcement system under a deep RTA.

CHAPTER 4 ECONOMIC AND POLITICAL FOUNDATIONS OF REGIONAL TRADE AGREEMENTS & THE ROLE OF REGIONAL COMPETITION POLICY

Introduction

The main research question this thesis attempts to answer is whether regionally integrated competition law enforcement systems in deep RTAs can help to overcome competition law enforcement related problems of developing countries. The second chapter was dedicated to mapping the problems faced by developing countries concerning competition law enforcement. The third chapter examined the suitability of regional competition agreements for addressing the competition law enforcement problems of developing countries. The chapter examined different types of regional competition agreement and concluded that regionally integrated competition law enforcement systems in deep RTAs may lead to the highest efficiencies in enforcement, and might thereby be more helpful in addressing the specific difficulties faced by developing countries. It was suggested, however, that the achievement of such an advanced level of regional competition law enforcement is inherently subject to the existence of a workable broader economic (and social) integration plan under the deep RTA between the parties. In order further to investigate this dependency the present chapter examines the motives of sovereign jurisdictions in entering into regional integration agreements. A detailed analysis of political and economic dynamics in RTAs is made in order to gain an understanding of the role given to regional competition policy in deep RTAs. In line with this, the chapter discusses the effect of establishing a regionally integrated competition law enforcement system in the context of a broader economic (and social) integration scheme under a deep RTA.

In light of the above Chapter 4 is organised as follows: Section 4.1 will give an impression of the basic rationale for regional integration and note the economic and political motives for regional integration in bullet-points. Section 4.2 will provide brief information on the evolution of regional economic integration. Sub-Section 4.2.1 will examine the historical evolution of regional economic integrations in Europe, as the EU today is the most prominent regional integration. Sub-Section 4.2.2 will shift the focus to developing countries and explain the three waves of regionalism from the 1960s to

the present. Section 4.3 will then examine the major economic motives for regional integration from the perspective of sovereign states, and Section 4.4 will discuss the key factors that should be considered for increasing economic gains from regional integration. Political motives for regional integration will be demonstrated in Section 4.5. In the light of these economic and political motives Section 4.6 will submit that economic expectations lie at the heart of regional integration. Section 4.7 will examine the role of regional competition policy in the broader regional integration context of a deep RTA and in this context, comment on the further implications of the broader economic (and social) integration design of deep RTAs on regionally integrated competition law enforcement systems. Section 4.8 will offer a brief summary of findings.

Section 4.1 The Basic Rationale for Regional Integration

Chief purpose of regional integration is to secure the benefits of larger population and greater resources (natural as well as human and financial) at the regional level.

From an economics perspective the principal aim of regional integration is to achieve economic growth. Subject to the presence of an adequate investment environment, unrestricted trade within a regional bloc may translate into increased (allocative, productive and dynamic) efficiencies, and reduced transaction costs, both of which may contribute to growth of businesses in the given region. Growth of businesses, on the other hand, might diffuse to the public and thereby increase the wealth of the citizens in some or all member states.[1]

From a political point of view, the principal purpose of regional integration is to ensure regional peace by strengthening economic and social links between the participating jurisdictions to an extent that a profound political dispute or a war within a regional bloc, as well as with third countries, becomes (at least economically) highly undesirable, if not impossible. In addition, regional integration may provide significant leverage in international negotiation if the member states of a regional bloc agree to act in a uniform manner or decide on joint representation.

[1] Harmonisation of laws on multiple industrial and social policies might reduce the operational costs and increase efficiency of businesses further, and thereby help economic growth.

All major economic and political motives for regional integration will be assessed in detail below. Major economic motives of sovereign states will be examined under five headings: (i) profiting from trade flows triggered by common internal and external trade policies; (ii) achieving economies of scale and scope, and greater specialisation across the region; (iii) attracting FDI and gaining increased credibility; (iv) triggering knowledge transfers from within and outside the region, and (v) enjoying better trade preferences as a result of increased bargaining power in international trade negotiation.

Political motives for entering into an RTA can vary significantly across different geographies. Nevertheless, the following sections will examine the *major* political motives under five headings: (i) intra-regional and extra-regional security concerns (*including the 'new security' needs*)[2], (ii) locking-in domestic reforms via commitment mechanisms under an RTA,[3] (iii) increased bargaining power in international negotiation, thus '*getting noticed*' in the international arena, (iv) avoiding negative outcomes of '*marginalisation*' in a globalised trade environment; and (v) receiving the support of strong lobbies and/or individual voters.

Before the examination of the above motives, the next section will give an overview of the historical development of regionalism

Section 4.2 Evolution of Regional Economic Integrations[4]

4.2.1 Historical review of the shift from 'closed-economies' to 'free trade' in Europe: regional integration through bilateral preferential trade agreements and early customs unions

International trade has not always been governed according to supply and demand, but rather by the power games of sovereign states. As Findlay and O'Rourke (2009) pointed out:

> '…the greatest extensions of the world trade have tended to come not from the bloodless tâtonnement of some fictional Walrasian auctioneer but from the barrel of a Maxim gun, the edge of a scimitar, or the ferocity of nomadic horsemen. When trade

[2] (Damro, 2006), p. 32-4.

[3] Lock-in effect is particularly the case with RTAs between developed and developing countries. (Previous literature often refers to developed and developing countries as North and South, respectively. However, given the current level of globalisation and the changing nature of economic powers across the globe, the North – South division is now less pronounced).

[4] Although there are slight differences in their meaning, the terms 'regional integration', 'regional economic integration', 'regionalisation' and 'regional trade agreement' will be used interchangeably throughout this paper to explain regional economic integration of countries under an RTA.

> required more workers, parental choices regarding quality/quantity trade-offs could often safely be ignored, since workers could always be enslaved. When trade required more profits, these could be earned via plunder or violently imposed monopolies. For much of our period the pattern of trade can only be understood as being the outcome of some military or political equilibrium between contending powers...
>
> Politics thus determined trade, but trade also helped to determine politics, by influencing the capacities and the incentives facing states.'[5]

In the seventeenth and eighteenth centuries trade was under the dominant influence of nationalist and mercantilist policies. Foreign trade was strictly controlled by governments which had the primary aim of accumulating gold and silver. Under mercantilist policies imports were restrained and exports encouraged. States-imposed monopolies and exclusive trade agreements with overseas colonies were at their peak.

The first real impetus for free trade in Europe[6] was the change in the foreign trade policies of Britain and France following the collapse of the colonial routes in 1770s.[7] With the gradual loss of revenue raised from the colonies, commercial interests of both countries shifted towards increasing their trade in Europe. This had led to discussion on removal of barriers to trade between European countries.[8]

Only in the late-eighteenth and nineteenth centuries did fruitful debate emerge on the desirability of free trade. Two grand pillars of thought led these debates.[9] On the one hand, Adam Smith (in *The Wealth of Nations*, 1776), followed by David Ricardo (in *On the Principles of Political Economy and Taxation*, 1817) argued in favour of liberalisation of the markets and heavily influenced free trade movement in Europe. On the other, opponents of free trade, most famously Alexander Hamilton (in *the Subject of Manufactures*, 1791) and Friedrich List (in *National System of Political Economy*, 1841), defended the need of protectionist policies for infant industries and contributed to the employment of protectionist policies in America in the early-1800s.[10]

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[5] (Findlay & O'Rourke, 2009), p. xviii-xix.
[6] For a careful analysis of the historical development of customs unions in Europe in the late-eighteenth and nineteenth century, see (Irwin, 1993).
[7] Ibid. p. 92-3.
[8] Arguably, the Hanseatic League of the 13th – 16th Centuries had certain similarities to preferential trade agreements. However, the members of Hansa were independent of the rulers of their respective territories. The rise of the nation-state and strong governments led to the decline of the Hanseatic League. Likewise, membership of Hansa was far more flexible than contemporary RTAs, as the members of the former could come and go to the League according to their changing interests at the times. See, (Halliday, 2009).
[9] (B. M. Hoekman & Kostecki, 2001), p.25-6.
[10] Ibid.

In the nineteenth century the first movements towards free trade in Europe occurred through the use of 'most favoured nation' (MFN) provisions in *bilateral* preferential trade agreements. These MFN clauses enabled signatory states automatically to preserve their non-discriminatory access to one another's markets in the event that either provided preferential trade conditions to a third country. The first use of the most-favoured-nation clause was in the Anglo-French commercial treaty of 1860.[11] According to Article V of the complementary Convention of the treaty:

> 'Each of the contracting powers engages to extend to the other any favour, any privilege or diminution of tariff which either of them may grant to a third power in regard to the importation of whether mentioned or not mentioned in the treaty of 23rd of January, 1860.'[12]

Following the Anglo-French commercial treaty, many European countries sought similar bilateral preferential trade agreements. Consequently low-tariff agreements gained a broad coverage throughout the Europe and restraints to intra-European trade were gradually reduced. However, the two world wars and the Great Depression of the 1930s undermined the liberalisation of the European market and neo-imperialist policies were temporarily resumed. Nevertheless, the use of the MFN clauses for regional integration preserved its place in international agreements. Even today the MFN principle carries a central weight in WTO legislation.

In parallel with the development of bilateral preferential trade agreements European countries had been discussing customs unions since the seventeenth century. Early seventeenth century France, although politically united under a monarch, was economically divided with numerous internal tariffs and customs regulations. A customs union was reached only in 1664 by the northern provinces of France.[13] Likewise, as early as 1665, Austria, Spain and Bavaria were considering establishing an economic union.[14] The most elaborate customs union of the nineteenth century, however, was secured in the territory of today's Germany *(i.e. German Zollverein*).[15]

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[11](Irwin, 1993), p. 95-6.
[12] Irwin notes that '[w]*hile Britain insisted on marking its own tariff reductions applicable to all nations, France lowered its import duties on British goods only, adopting a two-tier tariff system of "autonomous" tariff rates for MFN countries and higher "conventional" rates for others.*' (ibid., p. 96-7) Britain's adaptation of unilateral free trade goes back to 1840s. In this respect Britain acted as the pioneer of the free trade movement in the nineteenth century.
[13] (McPhee, 1992), p. 23; (B. M. Hoekman & Kostecki, 2001), p. 477-8.
[14] (Viner, 1950), p. 93.
[15] Ibid. pp. 97-102.

The agreement united the then numerous *German* principalities and harmonised trade policies across the region in an effort to achieve economic development and political empowerment.[16]

World War II changed the dynamics of trade significantly across the world. In 1950s war-torn continental Europe pioneered *deep* regional integration in its fight for urgent economic growth against the dominant economic powers of the era, the US and the USSR. During the Cold War of the capitalist and communist world powers economic integration in continental Europe flourished, with the keen support of the US, on the basis of liberal economic policies.

The EU[17] is currently the most prominent example of *deep* regional integration and therefore other regional blocs across the world often take the EU's practices as a guide. Before examining the motives for regional integration, the following section will examine three waves of regionalism in developing countries.

4.2.2 Three Waves of Regionalism in Developing Countries

'*Regionalism*' may be defined and categorised according to the perspective of different disciplines.[18] For example, regionalism has been defined as '*an economic process where economic flows grow more rapidly among a given group of states (in the same region) than between these states and those located outside.*'[19] Alternatively, some define '*regionalism*' as '*a political process characterised by economic policy cooperation and coordination among countries.*'[20] A detailed review of different perspectives on the definition of regionalism remains outside the scope of this thesis. The following

[16] (Mattli, 2000), p. 154-61. On a different point, some argue that the German Zollverein was a key building block of German unification and today's Federal Republic of Germany [(B. M. Hoekman & Kostecki, 2001), pp. 22-3 and 477-8]. However, (Viner, 1950) disagrees. With reference to old customs unions, Viner notes that '*in none of these cases it can be held that the tariff unification was in any way responsible for creating a sentiment favorable to political union, or that it in any other significant way made a substantial contribution to the eventual realization of political unity*' (p. 96). In line with (Viner, 1950), see (Schiff & Winters, 2003), p. 202.

[17] In the following, the term European Union is used to include the European Coal and Steel Community, the European Economic Community and the EU.

[18] For a good literature review on different definitions of regionalism, see, (Mansfield & Milner, 1999), pp. 590-2.

[19] Ibid. p. 591.

[20] (Fishlow & Haggard, 1992) as cited in (Mansfield & Milner, 1999), p. 591. The authors make a distinction between the terms 'regionalism' and 'regionalisation'. Regionalisation refers to the process of concentration of economic flows, trans-nationalisation and de-territorialisation at the regional level; see also, (Sanahuja, 2012), p. 2.

sections, however, will consider both economic and political cooperation aspects of 'regionalism' when examining the motives that lead sovereign states to sign RTAs.

For the purposes of this research the historical development of regionalism is reviewed in three waves: closed, open, and post-liberal regionalism.[21]

Closed Regionalism:

In the 1960s, as EU member states began to reap the benefits of economic integration, the idea of regional cooperation and gradual economic integration rapidly gained popularity across the world. Developing countries were attracted to the idea of promoting peace and economic growth by regional economic integration.[22] However, with the influence of the Cold War, the world was divided according to economic and political ideology as a result of which countries implemented different and often conflicting trade policies. Regional integration agreements of the second half of the twentieth century were inevitably shaped by these divergent trade policies.

In the twentieth century developing countries were still pursuing mercantilist trade policies (i.e. trade policies which aim to achieve economic development by restraining imports and encouraging exports). Inspired by the success of European integration, some developing countries, particularly those in Latin America and Sub-Saharan Africa, attempted to integrate their national economies in parallel with their existing mercantilist trade policies.[23] Accordingly, developing countries experienced '*closed-regionalism*' in the 1960s.[24] The main objective of closed regionalism was import substitution. Developing countries aimed to replace imports from third countries with exports from their regional partners. By abolishing the barriers to intra-regional trade countries pursuing closed regionalism expected to achieve more efficient allocation of resources within their regional blocs, and specialisation in production and services which would in return promote higher efficiencies. In addition, some regional blocs formed by developing countries implemented heavily protectionist policies in order to protect their local infant industries from foreign competition.

[21] On evolution of regionalism, see: (Matthews, 2003); (World Bank, 2000), p. 1-3; (Bhagwati, Greenaway, & Panagariya, 1998), p. 1128-9; (Gratius, 2012), pp.13-6. Not all of these authors embrace the same categorisation of the waves of regionalism.
[22] See, Sections 4.3 and 4.4 below.
[23] (B. M. Hoekman & Kostecki, 2001), p. 476-7; (World Bank, 2000), p. 2 and (Matthews, 2003).
[24] Ibid.

Closed regionalism, however, did not meet these expectations. On the contrary, most of the respective countries suffered from economic downsizing as a result of regional integration. One reason for the failure was the insufficient scope and depth of regional integrations to achieve the intended efficiencies.[25] Furthermore, the RTAs between developing countries failed to overcome the dependency of member states on external input (i.e. imported goods from outside the relevant regional blocs) in their domestic manufacturing. As a result strong protectionism increased the cost of imports from non-member countries, thus making domestic as well as regional production less profitable. By the late-1970s the ineffectiveness of closed regionalism was generally acknowledged.

Open Regionalism:

Regionalism saw a resurgence in the second half of the 1980s. The unilateral liberalisation trend across the world was then a significant influence on the dynamics of international trade. First the EU, a little after the US, began to negotiate preferential trade agreements with developing countries, and thereby played an important role in the expansion of RTAs.[26] In this second wave of regionalism international trade had gradually moved from '*closed regionalism*' to a more open market structure. The principal mechanism for regional integration was changed from a protectionist, import substitution model to a liberal, free market model. The second wave of regionalism, also known as '*open regionalism*' or '*new regionalism*'[27], ultimately aimed at improving the access of member states of an RTA to the global markets by increasing their international competitiveness.[28]

In the 1990s liberal economic policies embraced by developing countries led to the reduction of external tariffs, privatisation of state-owned enterprises, and increased trade through new or reformed customs unions. MERCOSUR was formed based on the principles of open regionalism; likewise, some of the then-existing regional blocs such as CARICOM, CAN, and SICA (the Central American Integration System) reformed

[25] The '*depth*' of regionalisation concerns the level of harmonisation within a region in terms of economic, political and/or social governance. Whereas the '*scope*' of regionalisation concerns the number of member states of an RTA.
[26] (B. M. Hoekman & Kostecki, 2001), p. 477-8.
[27](Matthews, 2003).
[28] (Gratius, 2012), p. 15

the terms of their regional cooperation in line with the free market approach of open regionalism.[29]

Open regionalism still defines the main principles of cooperation under many contemporary regional blocs.

Post-Liberal Regionalism:

Sanahuja (2012), however, argues that some developing countries have now recognised certain drawbacks to open regionalism. According to the author, under the second wave of regionalism most RTAs were mainly designed to achieve negative integration and included only few or no provisions for positive integration.[30] In line with this, regional integration led to *increased* regional inequalities (e.g. as in the WAEMU[31]), and thereby triggered political tension in some regional blocs.[32]

Secondly, most RTAs between developing countries embrace *and today are still embracing* inter-governmental cooperation instead of supra-national cooperation. However, due to the special political economy of developing countries, absence of regional institutions with supranational powers might discredit the regional policies and institutions, and fail to ensure full compliance of member states with the regional legislation.[33]

Thirdly, the current state of globalisation, free trade policies and open regionalisation have encouraged developing countries to enter into multiple RTAs.[34] Unprecedented proliferation in RTAs created conflicting commitments for developing countries under different RTAs,[35] and the simultaneous administration of the respective agreements became costly and complex.

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[29] Ibid.
[30] Positive integration refers to common rules that aim at reducing inequalities within a regional bloc. It entails harmonisation of social policies and cooperation in institution building. By contrast, negative integration refers to common rules that aim at removing barriers to free trade only. See, (Sanahuja, 2012), pp. 3-4. See also, (World Bank, 2000), p. 2-3.
[31] See around fn. 102 below.
[32] (Sanahuja, 2012), pp. 3-4.
[33] Ibid. The author cites the MERCOSUR as an example.
[34] Multiple RTA membership is very common, especially in Africa. For instance, Swaziland is a member of three RTAs (COMESA, SACU and SADC). On membership of multiple RTAs in Africa, see (Gathii, 2010), pp. 653-65. Chapter 5 further examines the problems in relation to multiple RTA membership.
[35] Ibid.

Post-liberal regionalism (a.k.a. socio-political, post-commercial, or post-hegemonic regionalism) is a fairly new concept which is used in relation to Latin American regional integrations since the early 2000s.[36] Post-liberal regional integrations aim to reverse the invariable resignation to liberal free market ideology. The goal of post-liberal regionalism is to increase the role of the state, and to give more weight to positive integration.[37]

The terms of cooperation under this third wave of regionalism are not clearly defined. However, cooperation under post-liberal regional integrations may include '*commitments to political cooperation in the areas of social, technological, communications, financial, infrastructure, energy, judicial, and defence policies*.'[38] UNASUR (Union of South American Nations –which aims to integrate MERCOSUR and CAN) and ALBA (Bolivarian Alliance for the Peoples of Our America) are cited as representatives of this last wave of regionalism.

There are various uncertainties about the scope and credibility of post-liberal regionalism, and the possible spread of the term from Latin America to the rest of the world. The next section will examine economic factors that encourage sovereign states to sign into RTAs.

Section 4.3 Economic Motives for Regional Integration[39]

There is a massive literature dealing with the economic benefits of regional integration. Broadly speaking, there are two kinds of economic benefit of regional integration: those deriving from '*trade flows*', and those deriving from '*competition and scale effects*'.[40]

The term '*trade flow*' in its most minimal occurrence may be simply defined as a change in the parties to a commercial transaction. A trade flow takes place when Firm A changes its trading partner from Firm B to Firm C regardless of the subject of the transaction (i.e. the sale of any goods or services). Discriminatory tariff reductions in RTAs necessarily lead to changes in relative prices in member jurisdiction and in most

[36] (Serbin, 2012), pp. 148-53. According to Sanahuja, the move towards post-liberalism in Latin America occurred from 2005 onwards; see, (Sanahuja, 2012), p. 7.
[37] Ibid. (Gratius, 2012), pp. 15-6, (Serbin, 2012), pp. 148-53.
[38] (Saguier, 2012), p. 125.
[39] The sections on economic and political motives for regional integration (Sections 4.3 and 4.4) are mainly built on the relevant parts of (World Bank, 2000) and, (Schiff & Winters, 2003).
[40] (World Bank, 2000), p. 29.

cases such changes prompt trade flows.[41] Trade flows may benefit some member jurisdictions at the expense of other members and/or the rest of the world (ROW). As will be seen below, the accumulated effect of trade flows may or may not be profitable to the host countries, depending on, *among other factors*, the cost efficiencies of the firms involved in comparison with the ROW, changes in tariff rates, changes in prices, and elasticity of demand.

On the other hand, competition and scale effects can be related to improved efficiencies and economic potential due to a regional market larger than the domestic markets of each member state.

4.3.1 Trade Flows: Welfare implications of RTAs on the basis of trade creation and trade diversion

Until the mid-1900s RTAs were considered to be unconditionally welfare increasing. The superficial view was that the reduction or elimination of restrictions to trade in a certain region would eventually contribute to globally unrestricted markets, and would therefore be welfare-increasing.[42] Accordingly, the ultimate aim of all economies was the elimination of trade barriers worldwide, as it would lead to the highest efficiencies for all market players in all jurisdictions. From an economics perspective the elimination of all trade barriers would indeed be the most efficient option for all. In reality, however, there are always some political obstacles that prevent the formation of a global free trade area. A major drawback is the tendency of sovereign states to favour short-term domestic interest over long-term common economic interest. As a result of this tendency there is an unsettled discussion in the literature on whether RTAs are building or stumbling blocks to the ultimate goal of the elimination of trade barriers worldwide.[43]

The roots of today's economic understanding of the welfare implications of RTAs and resulting trade flows can be found in Jacobs Viner's seminal work, *The Customs Union Issue* (1950).[44] Viner starts with an assumption of a customs union agreement between

[41] Ibid. p. 39.
[42] (Lipsey, 1960), p. 496-7; (Bhagwati et al., 1998), p. 1128-9, 1136.
[43] See, (Bhagwati et al., 1998), pp. 1140-5. However, this question is beyond the scope of the present chapter since it does not *directly* relate to the motives of *sovereign countries* for forming regional trade blocs.
[44] As explained in Appendix I, regional economic integration can take place on various levels (i.e. FTAs, customs unions, common markets, full economic unions, etc.). However, a common feature of all levels

two countries and analyses the effects of mutual abolition of trade barriers on the national economic welfare of member states. He identifies two kinds of trade flow that a customs union may create, '*trade creation*' and '*trade diversion*', and concludes that a customs union agreement is desirable when it entails more trade creation than trade diversion. Subsequent studies, however, have proven that certain other factors have to be considered in making a reliable assessment of the economic welfare implications of an RTA.[45] However, as will be seen below, the terms 'trade creation' and 'trade diversion' Viner coined have remained the starting points of any economic welfare analysis of regional integration.

Under a customs union of two countries trade creation occurs when a less efficient producer's products in a member state (home country) are replaced by imports from the more efficient producer's products in the other member state (union partner). In other words trade creation occurs when higher cost production in the home country is replaced by imports from the lower-cost union partner.

A typical example of trade diversion arises when the home country is not a producer but an importer of a product from the ROW. As a result of a customs union the home country may displace its imports from the most efficient producer in the world with the imports from the less efficient union partner. Accordingly the price of the products of the union partner in the home country's domestic market might become lower than the price of the globally most efficient the ROW firm in the absence of tax duties on the union partner. Such diversion would only occur when the price difference between the products of the ROW firm and the union partner firm is below the tax duty the ROW firm is obliged to pay. In more general terms trade diversion occurs when a higher cost union partner firm displaces the lowest cost ROW supplier.

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of RTAs is introducing a mechanism for reducing or eliminating taxes and other custom duties exclusively for the internal trade among members of a regional bloc. In other words, although different RTAs may anticipate different levels of economic integration, ensuring preferential trade conditions to regional partners is indispensable to all RTAs. In line with this, economic analyses of regional integrations are dominated with discussions on welfare implications of discriminatory tariff reductions. The early economic literature on regional integration, in particular, is mainly developed around the assumption of a customs union. However, as all RTAs aim the reduction or elimination of tariffs, inferences about customs unions are at least partially applicable to other levels of RTAs as well. Therefore, in line with the economics literature, the below sections will analyse the economic effects of RTAs by using a customs union agreement as an example.

[45] Among others, (Meade, 1953, 1955), (Lipsey, 1957, 1960), (Collier, 1979), (Bhagwati et al., 1998), (Panagariya, 2000), (World Bank, 2000), (Anthony J Venables, 2001), and (Schiff & Winters, 2003).

The best way to clarify Viner's definition of trade creation and diversion effects of customs unions is to demonstrate them by example.

Case Study 1: Trade Creation

Country of origin	Price	Imports tax in A	Market price in A
A	£ 90	N/A	£ 90
B	£ 80	20%	£ 96

Assume that X is a homogeneous product and A and B are its only producers in the world. The marginal cost of X is £90 per unit in country A (*home country*) and £80 per unit in country B (*union partner*). The market for X is subject to perfect competition in both A and B; therefore the marginal cost of X is equal to its market price in both countries. A imposes a 20% tax on imports of X. All consumers are assumed to be well informed about the market conditions and always to act rationally (i.e. buying only from the cheapest source available), as usual in simple economic assessments.

In A's market for X, the market price of the products imported from B is £96 (i.e. £80 + 20% tax) and the products of the domestic industry in A is £90. Therefore all consumers in A buy domestic products only. Consequently a 20% imports tax is sufficient to protect A's domestic industry for the commodity X from producers in B.

Now assume that A and B have formed a customs union and eliminated tariffs for internal trade. Producers from B are now able to sell per-unit of X from £80 in A, while the per-unit price of the domestic products in A is unchanged. Consumers will then shift their entire purchase from domestic products to the imports from B. This shift from higher-cost home country A to lower-cost union partner B is called trade creation.

Case Study 2: Trade Diversion

Country of origin	Price	Imports tax in A	Market price in A
A	N/A	N/A	N/A
B	£ 80	35%	£ 108
C	£ 60	35%	£ 81

In order to provide an example of trade diversion, this time assume that A is not a producer but an importer of commodity Y. A can import Y only from B and C for £80 and £60, respectively. On these imports prices A imposes a 35% tax; thus the market price of the products of B and C in the domestic market of A for Y are £108 and £81 respectively. The above assumption concerning consumers is also applicable here.

Given these circumstances, all consumers in A buy commodity Y only from C for £81. However, when A and B form a customs union (and C remains outside the union), B's products will be sold tax free (for £80) in A's market, whereas the price of C's products (£81) will not change. Therefore, as a result of the customs union, consumers in A will change to imports from B, although production in B is actually less efficient. This change from the more efficient producer (C) to the less efficient union partner (B) is called trade diversion.

In light of the above Viner (1950) draw the above-mentioned general conclusion that the trade creation effect of customs union increases welfare, and the trade diversion effect of customs unions reduces welfare.[46] When a customs union is considered as a whole, some products could be trade creating, others trade diverting. Therefore according to Viner, the welfare implications of a particular customs union agreement will generally depend on the magnitude of the trade creation and diversion.[47]

An early and thoughtful critique of Viner's work can be found in Meade's '*The Theory of Customs Union*' (1955). Meade pointed out that Viner (1950) does not offer any method by which to weigh up the economic gains from trade creation against the losses

[46] (Viner, 1950), p. 43.
[47] Ibid. p. 52.

from trade diversion. Meade (1955) showed that for assessment of the effects of a customs union on total costs the total volume of trade flows as well as '*the extent to which costs have been raised on each unit of the diverted trade and the extent to which costs have been lowered on each unit of the newly created trade*' have to be considered.[48]

Case Study 3: The effect of a customs union on total costs

The point made by Meade can be demonstrated with the help of the two cases described above. Assume that A and B have formed a customs union which covers the trade of the products X and Y. The prices and tariffs given above remain the same.

In addition assume that A imports 100 units of X and 100 units of Y annually. Following the customs union consumers in A buy 100 units of X from B for £80 per unit, and the total volume of imports is £8000. Likewise, consumers in A buy 100 units of Y from B for £80 per unit; thus the total volume of imports is £8000.

Although, as shown in the above cases, the customs union is trade creating for commodity X and trade diverting for commodity Y, the overall effect of the customs union cannot be calculated simply by subtracting the two trade volumes. The percentage of price changes has to be included in the assessments. As a result of the customs union on in place, the price for X is reduced by 12.5% (£10 profit per each £80-product), and the price of Y is 25% higher than the price of Y before tax (£20 loss per each £80-product). The change customs union created in terms of the total cost of imports of X and Y by A is equal to approximately minus £1000 [i.e. (12.5% x £8000) – (25% x £8000)].

Secondly, Meade (1955) demonstrated that Viner's (1950) customs union model assumes that the demand elasticity is always zero and supply elasticity is always infinite.[49] However, for most goods and services neither is demand inelastic nor supply infinite. Figure 1 below shows trade creation and diversion examples of Cases 1 and 2 above. It employs the assumption of inelastic demand and infinite supply as claimed to be Viner's own assumption at the time of writing his 'The Customs Union Issue' (1950).[50]

[48] (Meade, 1955), p. 34-6.
[49] Ibid. p. 36-41.
[50] Note that (Viner, 1950) does not explicitly refer to any assumptions as the basis of his theories.

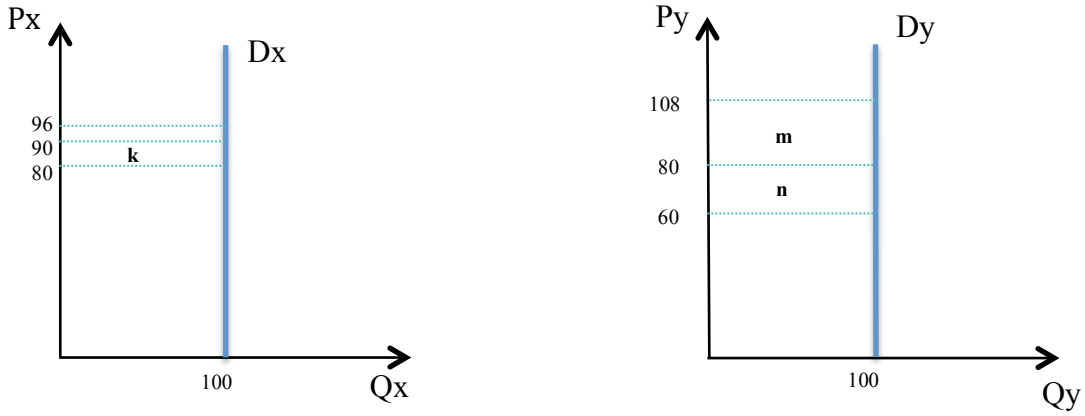


Figure 1: *Viner's Trade creation* **&** *Viner's Trade diversion*

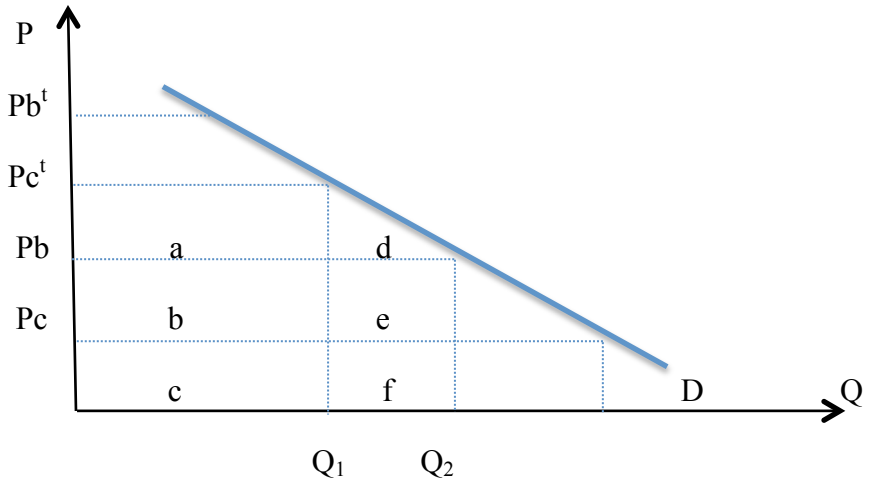
In Figure 1 the trade creation effect of the customs union under Case 1 is represented by the area [k]; and the trade diverting effect of the customs union under Case 2 is represented by the area [m + n]. In the first half of Figure 1 the area [k] represents consumer surplus in A; there is no loss shown on the diagram. In the second half of Figure 1, [m+n] represents A's tax revenue loss. Out of this loss, [m] is the consumer surplus, and [n] is the cost of B's higher cost of production to A. In other word, [n] represents a transfer of wealth from A to (the exporters in) B.[51]

Figure 2 demonstrates a customs union for a single product where demand is not inelastic but downward-slopping. To interpret Figure 2 assume that A (home country) is not a producer but an importer of commodity X. A imports X from B (union partner) and C (the most efficient ROW firm) for prices Pb and Pc respectively. A imposes a fixed [t] amount of tax on imports of X.

Before A and B form a customs union all consumers are expected to make their entire purchases of X from C for the price Pc^t (i.e. Pc + tax); and the total amount of purchase would be Q_1.

[51] However, when the demand is elastic, trade flows caused by a customs union will definitely change the product prices and thus the quantities. (Meade, 1955) followed, inter alia, by (Lipsey, 1957), (Bhagwati, 1971) and (Panagariya, 2000), rightly pointed out that this new supply cannot be judged by the value of the quantity sold before the customs union. Meade argues that while the initial quantity should be valued from the higher pre-customs-union price, the new supply should be valued by the lower post-customs-union price. See, (Meade, 1955), pp. 36-41.

Figure 2: *Trade Diversion with Inelastic Demand*



Following the formation of a customs union between A and B, B will be able to sell X from Pb in A's market and all consumers in A will shift their purchases from C to B. Given the downward-slopped demand, the reduction in the price of X from Pc^t to Pb, will cause an increase in the quantity sold, from Q_1 to Q_2 (i.e. the new supply). Accordingly, customs union will lead to new supply, thus newly created trade. The area [d + e + f] represents the newly created trade which would not exist in the absence of the customs union.

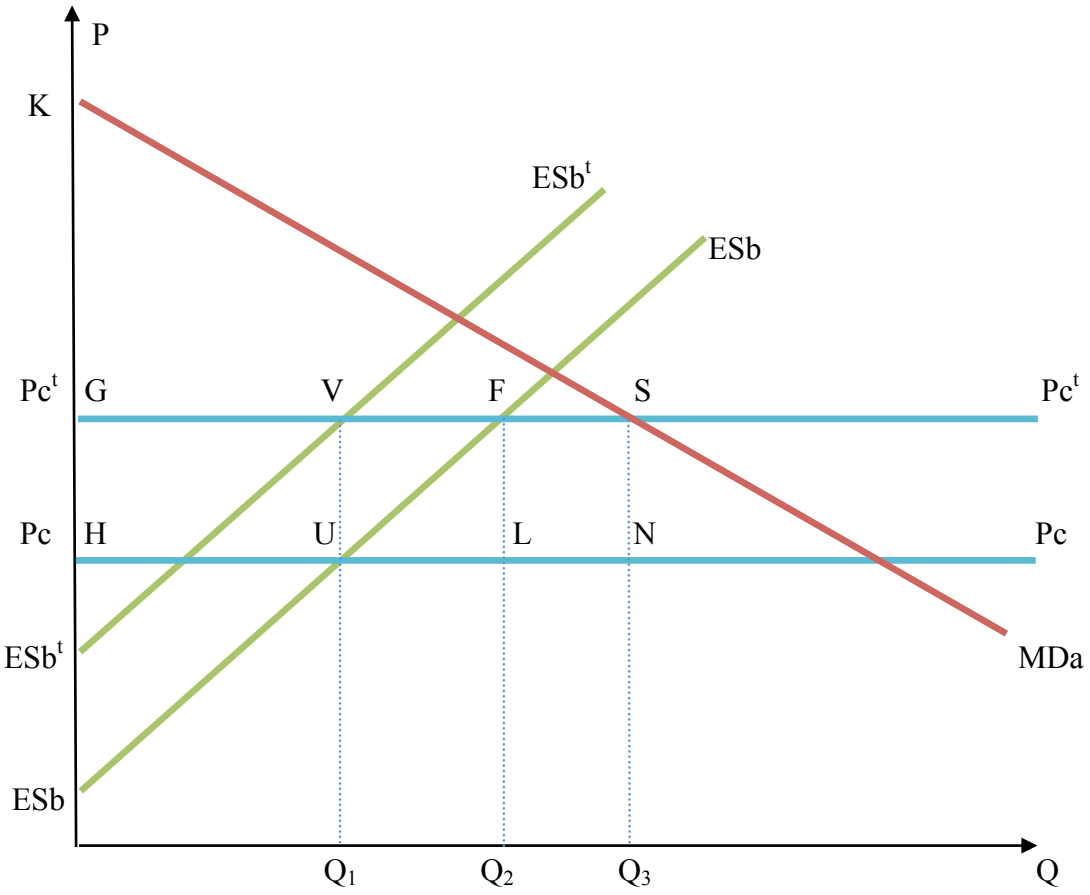
In Figure 2 the area [a + b] represents A's tax revenue loss caused by the consumers' shift from C's products to B's products. The area [a] represents the consumer surplus as a result of the reduction in the price of X after the customs union. Therefore area [a] shows the transfer of welfare from the government to consumers in A. On the other hand, the area [d] represents the gain of consumers on the new supply. On the downside the area [b] represents the cost of B's less-efficient production to A, which can be interpreted as a transfer of wealth from A to (the producers in) B.

The ultimate welfare implication of the customs union for A depends on the magnitude of these welfare transfers.[52] Although the opposite is the case for Figure 2, in reality it is perfectly possible that the gains from new supply (i.e. [d]) are greater than the cost of

[52] (Schiff & Winters, 2003), p.35.

the less efficient production of the union partner to A (i.e. [b]),[53] which would then mean that the customs union can be welfare enhancing despite trade diversion.[54]

Figure 3: *Pure trade diversion*



Source: Panagariya (2000), pp. 293-5

A more detailed analysis of the basic economic diagram for RTAs can be discussed with the help of Figure 3 above. Assume that A and B form a customs union which entails preferential tariff reduction for the trading of X. A (home country) is a producer as well as an importer of commodity X which is a homogeneous product. B (union partner) and C (the most efficient ROW firm) are the exporters of X. In B, X has a limited supply, so the supply curve of X is upward-sloping. On the other hand C has an

[53] (Panagariya, 2000), p. 292-3.
[54] With respect to the calculation of the cost implications of the customs union (Meade, 1955) suggests that the area [b + c] should be valued by the pre-customs-union price (i.e. Pct), whereas the area [e + f] and [d] should be valued by the post-customs-union price (i.e. Pb).

infinite supply of X, which is equal to Pc. A imposes a fixed amount of tax on imports of X from both B and C. The market price of C is therefore Pc^t (i.e. Pc + imports tax).

The export-supply curve of B is represented by ESb which is basically identical with B's domestic supply curve but starts from the autarky price in B (i.e. the price where B's demand curve meets B's domestic supply curve). In other words ESb is calculated by subtracting B's domestic demand from B's total supply. The import tax of A creates a shift in the export-supply curve of B, from ESb to ESbt.

Likewise the export-supply curve of B, import-demand curve of A is calculated by subtracting the domestic supply of X from the total demand for X in A's home market. In other words the import-demand curve of A for commodity X is basically identical with A's demand curve but starts from the autarky price in A (i.e. the price where A's demand curve meets A's supply curve). Import-demand curve of A is represented by MDa.

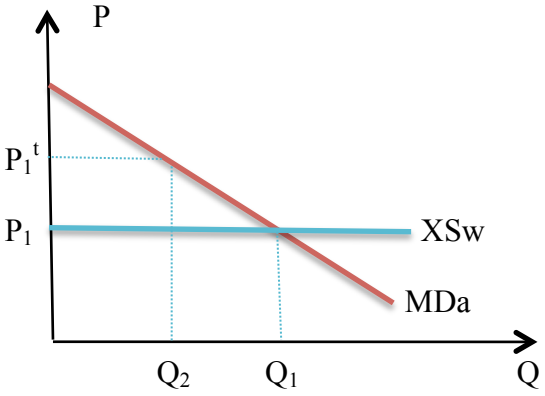
In the absence of a customs union Pc^t meets MDa at a lower price than ESb meets MDa; therefore all consumers buy X only from C for the price Pc^t. The total amount of sales is Q_3. Then assume that A and B form a customs union for commodity X, and eliminate taxes for their internal trade while harmonising their external tariffs. Assume also that extra-union terms of trade are fixed, so the price of C is not affected. Now the export-supply curve of B will be shifted from ESb^t to ESb; and the price of imports from C will remain the same, Pc^t. In this situation, despite abolition of the tax duty on B, MDa will still meet the Pc^t at a lower price than it will meet ESb. Therefore the imports may continue to come from C and the total quantity sold may not change. However, this does not mean that free trade between A and B will not lead to trade diversion. It is possible that following the customs union agreement the sale of X might be diverted from C to B to the extent of B's supply available at price Pc^t. In this case only the remaining demand in A will be imported from C. Consequently the sales of Q_1 Q_2 will be shifted from the more efficient C to the less efficient B. This would be a pure trade diversion as no new trade will be created. Due to this trade diversion the rectangular area GFHL will be the loss of tariff revenue of A. Out of this revenue the area GFHU will be transferred to (the exporters of X) in B, whereas the area FLU will be the dead-weight loss. In other words the area FLU will be lost both for the regional bloc and the ROW. There will be no gain for consumers in A either.

In the above case trade diversion may occur subject to the competitive pressure from C for selling on A's market. Geographical proximity between members of the customs union (in the example, between A and B) may trigger trade diversion to the proximate regional partner (i.e. B) on the assumption of lower transport costs the regional partner would incur as compared with those of more efficient and more distant ROW producer. In line with this some economists have argued that geographical proximity and/or high pre-integration trade volumes make regional blocs less prone to trade diversion;[55] and therefore, regional integration between parties that benefit from such factors should be considered to be '*natural trading partners*'.[56] However, economists do not seem to have reached consensus on the general applicability of this hypothesis.[57] Despite the uncertainty on economic effects of geographical proximity, in practice the great majority of deep RTAs are formed by neighbouring jurisdictions. However, this might be explained also by other non-economic factors, such as well-developed political relationship and historical ties between neighbouring jurisdictions.

In addition to the above, the size of domestic demand may directly influence welfare implications of trade flows triggered by regional integrations. The demand factor is particularly relevant to developing countries as most have small economies. Demand for a commodity in a developing country - or to be more precise, in a small economy- is usually too small to make any significant change in the total world demand for that commodity; thus the developing country cannot affect the price of the respective commodity in the world markets.[58] In such a case any tariff duty imposed by the developing country on imports of the respective commodity would be reflected in 100% in the domestic price of the commodity and be paid by domestic consumers. Figure 4 below helps to explain how tariff duties imposed on imports by small economies can be passed on to consumers.

[55] (Schiff, 1999) notes that the volume of trade between potential partners or the distance and transport costs between them are the two versions of the natural trading partners hypothesis (ibid. p. 2).
[56] (Wonnacott & Lutz, 1989) are the developers of the natural trading partners hypothesis. For an historical review of this argument see, (Freund & Ornelas, 2010).
[57] (Panagariya, 2000), pp. 303-4. (World Bank, 2000), p.41. (Schiff, 1999) argues that both supporters and opponents of the hypothesis miss the point by focussing only on the relationship between the home country and its regional partner and by failing to examine the relationship between the regional partner and the ROW.
[58] (Schiff & Winters, 2003), p. 54.

Figure 4: *The effect of imports taxes imposed by small economies*



Assume that A is a small economy and MDa is its import-supply curve for commodity X. Due to low domestic demand A will not be able to affect the world price of X. Thus the export-supply curve of X in the world market is horizontal, and represented by XSw. In the absence of an import tax A would import Q_1 amount of X at the price of P_1, which is equal to the world price of the commodity. If A imposes [t] amount of import tax, then the total amount of imports will reduce from Q_1 to Q_2; and the domestic market price of X in A will increase from P_1 to P_1^t. Consequently the tax amount (i.e. [t]) will be transferred from consumers in A to the government of A.

It has been shown in the above that the welfare implications of customs unions -and to a certain extent the other levels of economic integration- depend heavily on tariff rates of member states, the degree of change in prices, elasticity of demand, and the overall size of a given economy. However, all of the above assessments rely on the assumption that the customs union is relevant only to a single homogenous product, and that the trade conditions in the external world always remain unaffected. However, this is hardly the case in the real world trade. In order to calculate economic welfare implications of regional integrations various other factors must be considered in economic assessments. These factors may include, *among others*, changing trade dynamics in international markets, interdependencies across different product markets, changing demand patterns, inter-commodity substitution, and knowledge spillovers and other technological externalities.[59] Technical details of the influence of such factors will not be investigated any further in this chapter. It should be noted, however, that economic welfare implications of regional integration cannot be demonstrated by simple Vinerian trade

[59] (Meade, 1955), pp. 44-53; (Lipsey, 1960), pp. 499-503.

creation and diversion calculation.[60] Nevertheless, at least three matters may be considered to inform understanding of the general pattern of welfare implications of most RTAs; these are *(i) intra-regional welfare transfers and re-distributions, (ii) internal and external comparative advantages, and (iii) agglomeration effects*. These three points will be briefly explained in the following.

Intra-regional Welfare Transfers and Re-Distribution

A factor relevant to most RTAs that lead to trade diversion is intra-regional welfare transfers. As can be seen from Figures 3 and 4 above, trade diversions increase internal trade within a regional bloc only at the expense of trade with more efficient suppliers from outside the regional bloc. This means trade diversion normally increases the wealth of the exporting member state always at the expense of its importing regional partner. This is because the governmental revenue (i.e. tax revenue) the importing member state (home country) loses as a result of a trade diversion will be transferred to the suppliers in the exporting member state (regional partner) either in full, or in part (a part of the governmental revenue might be transferred to consumers in the importing member state). In such cases, when we consider short-term economic implications of trade diversions, welfare transfers between member states of an RTA cannot improve the welfare of the regional bloc as a whole because the gains accrued to the exporting member state cannot be higher than the revenue loss of the importing member state.[61] Long-term economic implications of regional integrations, however, might look different from a short-term view, especially on the ground of knowledge transfers

[60] (Lipsey, 1957), p. 41. The most commonly used model for assessing the economic welfare implications of RTAs is the '*gravity model*'. Assessments based on this model first identify several variables as determinants of trade, and then estimate whether changes in trade between two countries are a result of implementing an RTA. However, identification of trade variables and making assumptions on the pattern of trade that would occur in the absence of an RTA are among the weaknesses of the gravity model. It is noted that often the gravity equations cannot control all factors determining trade flows. An alternative model is '*computable equilibrium studies*' which enable researchers to construct a full economic model of the economies under consideration in great microeconomic detail, and then stimulate the effects of policy changes associated with an RTA. Reportedly, computable equilibrium studies generally suffer from complexity of data, and therefore fail in making rigorous economic estimations. On the two models of welfare assessments, see (Shirley & Walsh, 2000), pp. 44-9.

[61] However, there might be some situations where a trade diverting customs union nevertheless leads to welfare gains [e.g. when the home country allows substitution of consumption or when the supply elasticity in the home country is positive but finite); see (Panagariya, 2000), p. 293 and (Bhagwati, 1971)].

between member states (or from non-members),[62] decreased x-inefficiencies, scale economies,[63] and/or specialisation in production and services within a regional bloc.

Intra-regional welfare transfers often constitute a serious obstacle to the stability of regional integration. This is especially the case when the governmental budget of one or more member states is heavily reliant on trade revenue. Dependency of governments on trade revenue is a common practice in many developing countries. There is some evidence that in some developing countries trade revenue from imported products may constitute as much as one-half of the entire governmental budget.[64]

Internal and external comparative advantage:

The above discussion on trade creation and trade diversion is useful to understanding the various dynamics that may influence welfare implications of RTAs. However, such Vinerian analyses are not very informative of the general pattern of the distribution of gains and losses among member states of an RTA. Venables (1999)[65] discovered that distribution of gains and losses among member states of a customs union is determined by the comparative advantages of each member state relative to other member states as well as the ROW.

The main focus of Venables (1999) is welfare gains and losses for individual countries, rather than regional blocs as a whole. He demonstrates that countries with comparative advantage closer to that of the world average can gain more from entering into an RTA than countries with more extreme advantages.[66] The starting point of Venebles (1999) is the potential for trade diversion as a result of different domestic factor endowments of member states of a customs union. Different endowments, or in other words different comparative advantages, of countries in manufactures may be a function of various factors, such as the level of technological development, geographical location or institutional traditions.[67] As explained above, due to these comparative advantages (which reflect prices and demand), elimination of trade barriers in RTAs often creates intra-regional and extra-regional trade flows. On the assumption that the necessary data

[62] See Section 4.3.4 below.
[63] See Section 4.3.2 below.
[64] (World Bank, 2000), p. 44.
[65] See, (Anthony J. Venables, 1999). A revised version of the analysis in this paper can be found in (Anthony J Venables, 2003) which reaffirms the conclusions of the former.
[66] (Schiff & Winters, 2003), pp. 55-7.
[67](Anthony J. Venables, 1999), p. 4.

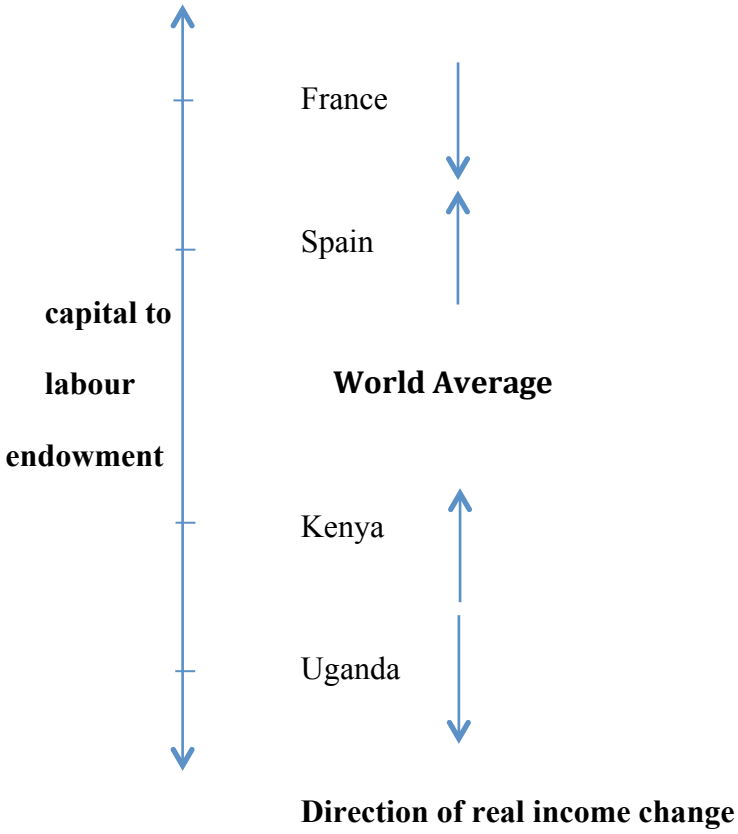
on comparative advantages of the countries are available, Venables establishes that if a country has an endowment like that of the world average, there will be less scope for diversion.[68] This is because such a country would conduct little trade with the ROW even before the regional integration, and therefore the amount of trade that might be diverted as a result of an RTA will be small. In line with this, if a country with an endowment close to that of the world average enters into an RTA with a country with a very different endowment, then the scope for trade creation would be the highest.[69] In addition, Venables demonstrates that countries with 'extreme' endowments relative to the world average are most likely to suffer a welfare loss.[70] Therefore Venable's first general conclusion concerning customs unions is that '*countries with "extreme" comparative advantage do worse than those with comparative advantage intermediate between partner and the ROW*.'[71] Moreover, Venables systematically ties comparative advantage to *per capita* incomes of member states, and draws a second general conclusion that customs unions between countries with above world-average endowments tend to cause convergence between the incomes of member states, whereas customs unions between countries below world-average endowments tend to cause divergence between the incomes of member states.

Accordingly, considering endowment of capital per worker, both Kenya and Uganda are below the world average, but Uganda has more extreme endowment. By contrast, both France and Spain are above world average, but France has more extreme endowment. The first regional integration is likely to lead to trade diversion from Uganda to Kenya due to the higher endowments of the latter. From the perspective of factor endowments, this can be explained by the availability of more or better skilled workers -and better trade conditions- in Kenya than in Uganda. If so, the resulting trade diversion will boost Kenya's net income to an amount that is closer to that of the world average. On the other side, Uganda, which had a lower net income level initially, will suffer further welfare loss. Consequently the customs union will lead to a divergence between the net incomes of the respective countries. By contrast, a customs union between France and Spain is more likely to create trade diversion from the richer member state, France, to its poorer regional partner, Spain. As a result the customs union is more likely to lead to

[68] Ibid. pp, 8-10.
[69] Ibid.
[70] Ibid.
[71] (Anthony J Venables, 2003), p. 759.

a convergence between the incomes of the respective countries. Trade diversion in the second case is based on the lower cost of labour (and possibly also land and other factor endowments) in Spain than that in France.

Figure 6: *Convergence and divergence of real incomes*



Source: Replicated from World Bank (2000) - which is based on Venables (1999)[72]

The above conclusions of Venables can also be observed in some real-world RTAs. For instance, Ireland, Spain and Portugal experienced significant growth in their per capita incomes following their accession to the EU.[73] By contrast, in the ECOWAS, although the regional integration increased the combined share of Ivory Coast and Senegal in manufacturing, Ivory Coast's income lead was narrowed.[74]

[72] Originally (Anthony J. Venables, 1999) refers to a customs union agreement between France and Portugal rather than France and Spain, but the remaining assumptions and conclusions are identical with the above.
[73] (Anthony J Venables, 2003) finds that '*whereas in the mid-1980s* [Ireland, Spain and Portugal's] *per capita incomes were, respectively, 64%, 67% and 57% of the income of the large EU countries, by the end of the 1990s the numbers had risen to 113%, 80% and 71%.*' (p. 747).
[74] Ibid.

In addition, a regional integration between two countries, one with endowments above that of the world average, and the other below that of the world average, is likely to benefit both parties as in each case comparative advantage relative to the partner and the world average push in the same direction.[75] It is suggested that benefits from such agreements can be particularly high for the lower-wage member state.[76] The positive effect of NAFTA, in particular to Mexico, can be cited as an example.[77]

In light of the above, the comparative advantage theory also suggests that RTAs between low-income countries are more likely to benefit richer member states at the expense of poorer, and therefore increase regional inequalities (i.e. divergence). On the other hand, RTAs between low-income and high-income countries are more likely to be mutually beneficial and lead to a convergence.

Agglomeration:

A further danger of trade diversion that is particularly relevant to developing countries is relocation of economic activity to a few centres within a regional bloc. This is called *agglomeration*. Economic centres in regional blocs typically arise from the interaction of centripetal and centrifugal forces.[78]

Centripetal forces are factors that lead firms to locate close to each other; centrifugal, to spread out. According to the usual classification, centripetal forces are a function of three factors.[79] Firstly, *knowledge spillovers or other technological externalities* may lead to clusters of firms, as this may make diffusion of new technological development among competitors easier.[80] Secondly, regional economic centres may lead to *labour market-pooling effects* which would then make skilled workers readily available to firms, and may increase competition. Lastly, *linkages between buyers and sellers* may also favour formation of economic centres since, if all other things are equal, sellers would normally like to locate closer to their consumers and vice versa.[81] On the other hand, centrifugal forces may be relevant to *congestion, pollution, dispersed consumers,*

[75] (World Bank, 2000), p. 56;(Schiff & Winters, 2003), pp. 56-7.
[76] Ibid. (Anthony J Venables, 2003), p. 759.
[77] (Schiff & Winters, 2003), pp. 56-7. Elsewhere it is confirmed that NAFTA has had a positive influence on the Mexican economy; however, the agreement alone is found insufficient to ensuring economic convergence between the NAFTA states; see (Lederman, Maloney, & Serven, 2003).
[78] (Schiff & Winters, 2003), pp. 137-8.
[79] (Marshall, 1920) as cited in (World Bank, 2000), pp. 56-9.
[80] See Section 4.3.4 below.
[81] (World Bank, 2000), pp. 56-9.

and negative externalities of concentration such as increased price of labour, land or other immobile inputs.[82]

Agglomeration may occur at an aggregate level or may be much more narrowly focussed, depending on the characteristics of a production process or industry, as well as the specific conditions of a certain geographical area.[83] RTAs may strengthen centrifugal forces by opening markets and stimulating trade flow. Depending on the level of economic integration, RTAs may also facilitate re-allocation of labour and other economic factors such as financial resources and services, and therefore speed agglomeration.

When agglomeration occurs in relatively small sectors spread across member states of a regional bloc, it might increase allocative efficiency and not lead to wealth inequalities between the member states. In other words, depending on domestic factor endowments, each member state might be specialised in the sector(s) in which it has the highest comparative advantage. By contrast, when domestic factor endowments of member states are heavily imbalanced, or when some parties suffer from under-developed infrastructure and/or under-developed financial and other business services, accumulation may take place on larger scales, leading various industries' being relocated only in few economic centres in the more-favoured member states. This would then mean trade diversion from less-favoured member states to their more advantaged regional partners. Likewise, when manufacturing in a regional bloc as a whole constitutes only a small share of the regional economy agglomeration will be more likely, since the relocation of businesses in a few economic centres would then not create substantial costs or supply constraints for the investors.[84]

Thus RTAs between under-developed countries are more likely to lead to agglomeration in the territory of the more developed member state of the region. In the long term, however, agglomeration might be partly reversed across a regional bloc depending on, *among other things*, (i) the extent to which restrictions to intra-regional trade are abolished, (ii) facilitation of free movement of 'factors', and (iii) the development of intra-regional transport links and other infrastructure.[85] In a healthy regionalisation process the price of land and labour would eventually increase in economic centres,

[82] Ibid. (Schiff & Winters, 2003), pp. 138.
[83] Ibid.
[84] (World Bank, 2000), 58.
[85] See, (Krugman & Venables, 1995), pp. 860-2.

which would in turn make the low-cost production opportunities at the periphery more desirable to businesses. The spread of an industrial movement from economic centres to the periphery, however, is conditional on the existence of well-established physical (hard) infrastructure (e.g. transport, electricity, telecommunication networks) and soft infrastructure (e.g. adequate social policies, laws, institutions), as well as supportive industrial policies. From this perspective a deep RTA which is likely to lead to agglomeration in one or a few more-favoured member state(s) in the initial period might be desirable as creating new trade in (and net investment to) the regional bloc on the condition that the RTA and subsequent (regional as well as national) policies are designed to support the gradual spread of industrial movement and services to the periphery.

Intra-regional welfare transfers, combined with agglomeration and more generally with the disproportionate benefits member states of an RTA may get due to different factor endowments, might constitute a threat to economic and political stability of regional integration. The above sections show that regional integration does not necessarily bring economic benefits to all participating jurisdictions. In line with the balance of the national factor endowments of member states and the supplementary regional and national policies, an RTA may fail to improve the economic condition of member states, or even worse, may increase intra-regional economic inequalities through divergence. In this regard a recent examination of per capita GDPs in WAEMU member states has shown that '*the countries that were the richest in 1990—Côte d'Ivoire, Senegal and Benin—remained so and experienced respective growth in income.* [By contrast]*, the economically weak countries such as Guinea-Bissau, Niger and Togo stagnated or fell behind.*' [86] As a result the average income gap between the two groups was increased by 56% between 1990 and 2007.[87] Arguably the regional integration between the parties played a significant role in the increased divergence.

Even if an RTA is welfare-increasing for all member states, the differences between benefits accrued to member states can lead to political conflict which may threaten the future of the regional integration. The EAC and the CACM can be cited as examples of

[86] (Seck, 2013), p. 32.
[87] Ibid.

regional integration that suffered heavily from inequalities in economic benefits accrued to member states.[88]

As was the case with the EAC member states of an RTA may agree to mitigate regional inequalities by direct re-distribution of wealth within a regional bloc. A contemporary example of an RTA which envisages direct re-distribution is the Southern African Customs Union (SACU). SACU member states implement a controversial revenue-sharing formula for re-distribution according to which regional customs and exercise revenues are first pooled and then re-distributed among the member states on the basis of their intra-SACU trade share.[89] However, such direct re-distribution mechanisms are economically problematic as they fail to recognise wider benefits of regional integration in the long-term, and instead focus on direct, obvious and immediately accrued benefits.[90] In addition, compensation has to be paid out of the public revenue of the member states that receive higher benefits despite the actual benefit of trade flows' accruing to the private sector which may be partly foreign owned.[91] In order to address such drawbacks of re-distribution developing countries might be advised to reduce their dependency on trade revenues by creating alternative revenue sources (e.g. VAT), and also to reduce external barriers to trade, minimising trade diversion and improving productive efficiencies.[92]

It may fairly be concluded that regional integration may create new trade and become a significant factor in facilitating economic growth. However, this positive economic outcome is far from definite. Independent jurisdictions must carefully assess their current and prospective share in the global trade, the parties with whom they are entering into an RTA, terms of the integration agreement, and complementary economic and non-economic policies aimed at reducing intra-regional inequalities. The above discussion suggests that rigorous ex-ante estimations on the welfare implications of an RTA might not always be possible.

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[88] See, Section 4.5.1 below.
[89] For the details of the SACU revenue sharing mechanism see Part 7 of the 2002 SACU Agreement. See also (Flatters & Stern, 2005), pp. 1-4. Due to disagreements between the SACU member states on their shares in intra-regional trade the union is currently working on the revision of the existing revenue sharing mechanism; see, (SACU, 2011).
[90] (Schiff & Winters, 2003), pp. 79-80.
[91] Ibid.
[92] Ibid. However, for SACU region, (Basdevant, Benicio, & Yakhshilikov, 2012) argues that direct redistribution, if carefully designed, can be very effective in reducing regional inequalities.

The following subsections will review further economic factors that might encourage countries to conclude RTAs. It will be seen that the other economic factors may also add to uncertainty about accruing benefits from trade flows created by a regional economic integration.

4.3.2 Economies of scale and scope

As noted above, the main function of all levels of RTAs is to eliminate barriers to intra-regional trade between member states. This means regional integration increases the size of the market that local firms of member states can freely access. From the perspective of businesses free access to bigger markets means more customers, and accordingly the opportunity to increase production and sales. This may improve productive efficiencies. Elimination of barriers to regional trade may also mean increased competition in regional markets.

The term *'economies of scale'* may be defined as lowering average costs by increasing scale (i.e. total quantity) of production. The term *'economies of scope'* may be defined as lowering average costs by increasing the scope of production (i.e. by producing two or more different -though usually close products). Because regional integration increases the size of the 'free market', companies can serve a bigger customer group and accordingly may be able to secure more efficient levels of production.

Achieving economies of scale and scope might be crucial to economic growth in developing countries. Like other small economies, developing countries are more likely to suffer from insufficient domestic demand for manufacturing on efficient scales. Inefficient production may in turn result in concentrated markets and low international competitiveness of local firms.

The literature suggests that economically integrated markets may create four positive economic outcomes that are particularly relevant to small economies.[93] Firstly, the growth of markets may increase the level of competition, thus help reducing monopolistic behaviour.

[93] (Schiff & Winters, 2003), p. 50-4; see also (World Bank, 2000), pp. 30-3.

Figure 7: *Average cost of production & economies of scale*

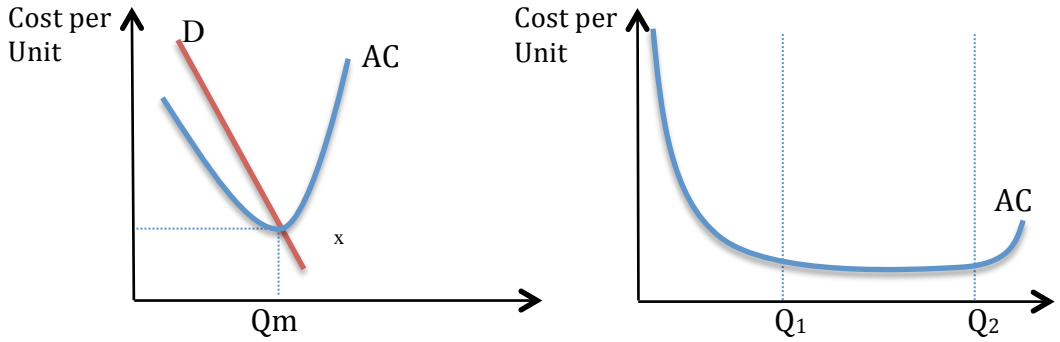

Figure 7 above shows average cost curves for two industries. Economies of scale would be achieved in the first diagram until Qm, and in the second diagram until Q_2. In the first diagram we see that the average production cost meets demand curve at the lowest cost of production point (represented by [x]). This means in such a market only one single firm can operate at the minimum cost. In other words the market has a tendency to monopolistic structure. In the second figure, which represents a relatively large industry, the production cost is at its minimum between Q_1 and Q_2. However, if the demand curve meets the average cost curve at point [a], then there would be only one firm that can operate at maximum cost efficiency. However, expansion of demand to a degree that meets the average cost curve somewhere in-between [a] and [b] would open the market to greater competition by giving an option to the firms to compete with each other while operating in a cost efficient manner. In this respect regional integration and expansion of markets can be useful in reducing monopolistic behaviour by introducing more competition.

Secondly, following the first point above, expansion of markets may allow small economies to increase their productivity levels. As noted above, regional integration means greater demand for companies operating in member states as a result of which they will be able to produce at more efficient levels (of scale and scope) which would in turn make domestic industries more competitive.[94]

Thirdly, increase in demand may reduce x-inefficiencies by increasing competition in the markets. X-inefficiencies, or in other words 'internal inefficiencies', occur where the possession of high market power reduces the incentives of firms to operate more

[94] (Cooke & Elliott, 1999), pp. 24-5.

efficiently.[95] In this regard, due to the absence of competitive pressure in the market, firms may not strain to increase their efficiency by better managerial arrangements or by reducing the costs, investing in innovation, etc. As a result of small demand market concentration and x-inefficiencies are more common in small than in advanced economies. Therefore potential gains from elimination of x-inefficiencies may be greater for small than for advanced economies.

Lastly, expansion of markets may increase the range and variety of production, which may in turn enhance consumer choice.

However, in the economic literature these benefits of economies of scale and scope are mainly attributed to the trade liberalisation effect of regional integration, rather than regional integration itself. There is some evidence of increase in efficiencies as a result of unilateral liberalisation of trade, whereas evidence of the relationship between regional integration and efficiency is arguably more vague.[96]

4.3.3 Attracting foreign direct investments (FDIs) and gaining credibility[97]

Governments as well as local businesses of many developing countries struggle to realise the large investments necessary to improving infrastructure and trade in their respective territories. Foreign investment may help funding certain key projects, trigger competition in markets and thereby play a crucial role in promoting economic growth in developing countries.

Creation of larger markets and increased competition as a result of regional integration may stimulate FDI. Broadly speaking, regional integration is attractive to foreign investors because the larger the market, the greater the possible economic gains. However, foreign investment is always conditional on the presence of an adequately safe investment environment which primarily requires, *among other things*, adequate property rights protection as well as banking, trade and investments regulation, and a well-working administrative system.[98] If a foreign investor had previously suffered financial loss in a country as a result of sudden tariff changes, tax increases or

[95] (Motta, 2004), p. 47-8.
[96] See (Schiff & Winters, 2003), p. 51-4, and (World Bank, 2000), p. 31-2 and the references therein.
[97] As a related issue, Sub-Section 4.4.4 below concerns regionalisation of countries to lock in domestic reforms.
[98] (Schiff & Winters, 2003), p. 101-22.

expropriation, he would approach that country with great caution.[99] Consequently FDI depends crucially on the credibility of the receiving country in its intention and ability to pursue liberal economic policies.

Regional integration may serve to increase the credibility of a country by adopting binding commitment mechanisms as the guarantee of that country's pursuance of liberal economic policies and protection of the trade environment. In particular, regional integration between developed and developing countries, where member states can directly punish one another for infringement of regional rules (the so called '*club rules*'), adds important credibility to the governments of the developing member state.[100]

An empirical study by te Velde and Bezemer reconfirms that being a member of a regional bloc increases extra-regional FDI inflows.[101] The authors, however, also demonstrated that not all RTAs lead to the same amount of FDI inflow, and likewise not all member states of a regional bloc gets the same amount of FDI inflow.[102] The factors that might affect the amount of FDI inflow into a member state of a regional bloc include, among others, (i) the presence of an adequate investment environment, (ii) the relative size of a member state in the regional bloc (when all other things being equal, larger member states might attract more FDI), and (iii) the closeness of a member state to the largest economy in the region (the closer the better).[103] With respect to adequate investment environment, te Velde and Bezemer suggest that the presence of greater regulation of investment and/or trade may significantly increase investment inflow – by about 41% to 123% on average.[104]

In addition to the above, FDI may be the key source of new technology, particularly in developing countries. The effect of FDI on technology transfers will be examined in the next sub-section.

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[99] Ibid. 107.
[100] (Matthews, 2003); see also, (Lloyd, 2002), p. 1284.
[101] The study examines the UK's and the US's FDI in developing countries over the period between 1980 and 2001. With respect to the NAFTA, MERCOSUR, CARICOM, ASEAN, ANDEAN, SADC, and COMESA regions, the authors note that '*the real stock of FDI is on average 68% higher if countries become a member of one of the seven regions identified above*'; (Te Velde & Bezemer, 2004), p. 22.
[102] Ibid., p. 23.
[103] This is because, when all other things are equal, investors like to be close to the source of greatest demand; ibid., pp. 23-4.
[104] Ibid.

4.3.4 Knowledge transfers due to regional integration

Hoekman and Javorcik (2006) recognise that '*international technology diffusion*' can occur at least through three channels: (i) trade in goods and services, (ii) FDI or the pursuit of project-specific joint ventures, and (iii) direct knowledge transfers through technology purchases or licensing.[105] Trade in goods and services may increase productive efficiency when imports are used as an input in production.[106] Moreover, use of new technologies may spread when exporter firms are supplied with technical knowledge on product design and production techniques by knowledgeable buyers.[107] Secondly, FDI often leads to transfer of knowledge though management of local subsidiaries, through direct use of new technologies in the host jurisdiction, or through establishment of joint ventures for specific projects or R&D. With respect to technology transfers through both trade and FDIs, once knowledge is transferred to a firm by a transnational partner, it may further spill over to other firms operating in the same industry in the host country via '*demonstration effects, labour turnover, mutual input suppliers, or reverse engineering*.'[108] Lastly, knowledge can be acquired by direct payment through licensing or other purchases.

As seen in previous sections, an RTA may create new trade between its member states due to elimination of barriers to intra-regional trade. In addition, there is some evidence that formation of a regional bloc may increase the volume of trade of member states with non-member jurisdictions.[109] While an increase in trade is inevitably dependent on numerous factors such as the size of an economy, per-capita income, existing infrastructure, geographical position, and connectedness to world markets, trade liberalisation is likely to promote trade, and thereby facilitate economic growth. Similarly, as shown in the previous sub-section, regional integration may attract FDI and increase commercial activity across the relevant region. To the extent that an RTA leads to increased cross-border commerce it can stimulate international technology transfers.

[105] (B. Hoekman & Javorcik, 2006), p. 2.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] This may be a result of decreased x-inefficiencies or the achievement of scale economies as a result of regional integration. See also (Te Velde & Bezemer, 2004), p. 22.

Increased trade and FDI are among the key factors that facilitate the use of new technologies, especially in small economies.[110] Ensuring openness of an economy into those countries that hold largest technological knowledge stocks could be desirable for maximising technology diffusion.[111] Developed countries tend to use more superior technology in production and undertake more R&D than do developing nations. For this reason one might conclude that a developing country would benefit from international technology diffusion significantly more if it establishes strong trade ties with developed countries rather than with other developing countries. Knowledge diffusion, however, is primarily dependent on the host county's absorptive capacity. Trade liberalisation should ideally be accompanied by complementary public policies. Relevant complementary policies might include, among other things, education reform, R&D initiatives, and amendments to intellectual property legislation. Countries with a weak education system, in particular, might struggle with dissemination of new technology, as these might not be understood by local investors/workers in full. Coe, Helpman, and Hossmaister (2009) suggest that '*countries where it is relatively easy to do business*' and '*countries where the quality of tertiary education systems is relatively high*' tend to benefit more from their own R&D efforts, from international R&D spillovers, and from human capital formation.[112] The estimates of authors also confirm the positive effect of strong patent protection on R&D spillovers.[113] Nevertheless, when the institutional arrangements in a developing country allow the transfer of new technologies, that country might be better off in terms of achieving larger R&D spillovers by entering into deep RTAs with developed countries. That said, market access to firms from countries that hold largest technological knowledge stocks can also be provided through unilateral trade liberalisation or separate bilateral preferential trade agreements.

4.3.5 Better trade preferences as a result of increased bargaining power

Countries forming a regional bloc may prefer to represent themselves jointly, as a region, in international trade negotiation. This is because, when all other things are equal, a large geographical market will always have higher trade potential than a

[110] (B. Hoekman & Javorcik, 2006); (World Bank, 2000), pp. 59-60; (Cooke & Elliott, 1999), pp. 24-5.
[111] (World Bank, 2000), pp. 60-1. See also, (Coe & Helpman, 1995), (Coe, Helpman, & Hoffmaister, 1997), (Coe, Helpman, & Hoffmaister, 2009), (B. Hoekman & Javorcik, 2006).
[112] (Coe et al., 2009), pp. 733-6.
[113] Ibid.

smaller geographical market. As a result, in the eyes of the third jurisdictions, the negotiating leverage of a regional bloc as a whole could be higher than the negotiating leverage of each member state individually.

Alternatively, individual members of a regional bloc may communicate their preferences to each other prior to actual negotiation, and agree to vote in favour of one another's preferred areas. This alternative mechanism is called '*logrolling*', which may be defined as the policy of '*I'll vote for your issue if you vote for mine*'.[114] However, if member states of an RTA pursue numerous diversified and/or conflicting interests, then collective action might not be possible. Likewise, collective action in international negotiation might get harder as the number of the member states of an RTA increases.

Collective action may help members of an RTA to obtain better preferential trade conditions (e.g. greater tariff reductions) from their external trading partners. However, superiority in trade negotiation also depends on the economic power of the counter side of the discussion. Therefore the influence of the joint representation or collective action of several developing countries before advanced economies might bring about only limited bargaining power due to the gap between the economic sizes of the parties.[115]

Section 4.4 Factors to Consider in Increasing Economic Gains from Regional Integration

Despite the complexity of assessments of trade flows, there are a few points of general application which may help increase welfare gains of individual states from RTAs.[116] These are listed below. The accuracy of inferences below, however, is contingent upon product substitution and demand patterns in a given regional bloc.

The first and the most commonly acknowledged rule of thumb is to minimise trade diversion by unilaterally reducing external barriers to trade. As noted above, trade diversion occurs when there is a trade flow from a more efficient ROW supplier to a less efficient regional partner due to the trade preference the RTA provides to the latter.[117] Accordingly, trade diversion cannot take place when (a) there is not any more

[114] (Schiff & Winters, 2003), p. 204.
[115] (Matthews, 2003).
[116] See, *inter alia*, (B. M. Hoekman & Kostecki, 2001), p. 479; (Schiff & Winters, 2003), p. 261-6; (Matthews, 2003); (B. Hoekman, Schiff, & Goto, 2002), p. 21-2; (Inotai, 1991), p. 7; (Langhammer & Hiemenz, 1990), pp. 59-68; and (Meade, 1955), pp. 107-15.
[117] See the Case Study 2 above.

efficient ROW supplier (which implies that the regional firms are the most efficient suppliers globally even prior to the RTA), or (b) there is no trade barrier to imports from the most efficient ROW supplier. Although the former case avoids trade diversion, it implies that the parties to the RTA are already globally competitive, so that the potential gains from the RTA will be relatively low. High international competitiveness might not be easy to achieve for most developing countries. Elimination or reduction of most barriers to external trade, on the other hand, is often at the discretion of the national governments. An RTA would be less prone to trade diversion the lower the external tariffs of its member states. In the absence of external tariffs there will be no trade diversion.

Although trade diversion leads to economic losses for the host member state (as well as for the ROW), it might still be a suitable policy for the protection of the *infant industries* of a regional bloc. Accordingly, member states of an RTA may initially keep external trade barriers high in order to protect their domestic firms operating in certain strategic sectors from international competition. As a result of high external tariffs and/or other direct or indirect subsidies, local firms operating in the respective industries may eventually grow and gain international competitiveness. This would give member states an export capacity in the long term. Comparative advantages of all member states of an RTA need to be considered prior to the implementation of a protectionist measure at the regional level. In this regard, various factors such as (i) international efficiency of local production in a regional bloc, (ii) transport networks and other infrastructure, (iii) the size of internal demand (relative to global demand), and (iv) any foreign input that is required for local production in the region need to be calculated. Extreme protectionist measures with high external trade barriers may reduce the average welfare of a regional bloc, rather than strengthen infant industries, as was the experience of developing countries in 1960s and 1970s.[118] Although some protection might be economically desirable for certain strategic sectors within a regional bloc, the decision on which sectors should be protected initially is politically difficult for *all* governments. To achieve efficient production and international competitiveness in the long-term, tariff preferences, subsidies and protectionist measures should be removed gradually once the protected industries become operational. At that time the reversal of protectionist policies may be another political challenge for both national

[118] See the explanations on closed regionalism under Section 4.2.2 above.

and regional governments. For instance, gradual reduction of common external tariffs in the CACM (Central American Common Market) faced the successful resistance of '*the new class of import-substitution industrialists*' in late 1960s.[119]

Secondly, gains from trade creation might be more likely if the volume of intra-regional trade is high and extra-regional trade is low prior to regional integration. Accordingly, a low level of imports from outside a regional bloc prior to integration represents less dependency of production in member states on external sources.[120] Less dependency on imports will mean that the regional bloc is less prone to trade diversion since it meets the domestic demand internally in a cost-efficient way even before the regional integration. High volumes of intra-regional trade will be the case if union partners are producing at higher efficiency levels than the ROW. In other words, if regional partners are among the most cost-efficient suppliers of commodities that are traded within the region, gains from regional integration will be more likely. However, in this case additional gains from product specialisation as a result of regional integration might be relatively small, as the agreement would have a more limited effect on trade flows. Furthermore, in practice, deep RTAs are typically entered into between neighbouring countries, although they are not necessarily formed between countries that are already major trading partners.[121]

Thirdly, similar to the second point above, gains from trade creation may increase if member states produce complementary products. This might be the case as a result of more efficient allocation of resources which may lead to inter-industry specification across the region in the long term. However, specialisation within a regional bloc is dependent on factor endowments as well as industrial development capacities of member states.

Fourthly, the greater the share of member states in the world's production, consumption, and trade, the higher is the likelihood that regional integration will lead to welfare gains. This argument has a parallel logic with scale and scope economies. A larger market may help firms operating in member states to reach efficiency in production or to gain increased buyer power in extra-regional trade negotiations. These may in turn increase the economic benefits accrued to member states. By contrast, if

[119] (J. W. Fox, 2004), pp. 5-6.
[120] However, this conclusion would not be applicable if the pre-regional-integration imports from third countries were low due to the inability of the parties to afford production.
[121] (Schiff & Winters, 2003), p. 35-6.

member states already control a large share of the world trade this is presumably a result of the existing 'comparative advantage' that member states have in international markets. In the latter case the effect of regionalisation in increasing efficiencies and accruing gains from regional specialisation might be small.

Fifthly, the higher the pre-RTA tariffs among member states, the higher the gains from the elimination of these tariffs by the RTA.

Sixthly, regional integration between two small developing countries is more likely to lead to trade diversion than trade creation.[122] Developing countries are usually small economies. As a result of small size, total supply in a regional bloc formed by developing countries may not meet the regional demand. In this case developing countries would continue to import some input from the ROW after regional integration. As a typical small economy cannot influence the price of goods in international markets, the domestic price will continue to be fixed at the world price plus import tariff.[123] In that case regional integration would not change internal demand within the region, but trade diversion may increase the cost of production within the region due to the trade flow from cheaper ROW producers to more expensive partner imports.[124] As a result the RTA would lead a loss for both countries and the ROW.[125]

In the light of the previous point, some argue the superiority of RTAs between developing and developed countries to RTAs between developing countries only.[126] By contrast, Shams (2003) argues that regional integration of developing countries is by no means inferior to that of developed and developing countries with respect to their economic gains potential. He, however, notes that the main obstacle to RTAs between developing countries is the wrong economic policies applied across the regions or in certain member countries.[127] In line with the above, regional integration of developing countries is further criticised for preventing them from establishing strong trade ties with economically more advanced developed countries. Moreover, regional integration

[122] Ibid.
[123] See around Figure 4 above.
[124] In this case economic loss will be the immediate effect of trade diversion for the importing member state and the ROW. For the exporting member state short-term economic gains from trade diversion might increase the efficiency of production. In the long term, however, barriers to external trade might lead to an increase in x-inefficiencies and therefore bring about economic losses. See also, (Schiff & Winters, 2003), p. 36.
[125] Ibid.
[126] See ibid., pp. 35-6; (Matthews, 2003), (B. Hoekman et al., 2002), p 9.
[127] (Shams, 2003), p. 2.

with advanced economies may ensure developing countries' access to bigger markets and better sources of trade, and may increase technology spillovers from advanced economies to developing countries. However, such disadvantages may partly be overcome when developing countries enter into bilateral or multilateral RTAs with advanced economies in parallel with (deep) RTAs with other developing countries.

Seventhly, the loss of governmental tax revenue as a result of trade diversion might be critical, in particular for less developed countries. As shown above, tariff reductions under an RTA often lead to wealth transfers among member states. Since many developing countries are dependent on trade revenues for their public expenditure, the immediate wealth loss suffered as a result of trade diversion might not be tolerable for the domestic economy of such member states.[128] In order to cope with the revenue losses resulting from regional integration member states may seek to adopt alternative sources of governmental revenue prior to entering into an RTA.[129] In the absence of such mechanisms deep RTAs between developing countries in particular may reduce the wealth of relatively poorer member states (thus lead to divergence), and may create political tensions that may endanger the sustainability of regional integration. This problem is more acute with deep RTAs that establish monetary union, since this leaves the national governments of member states with even fewer instruments with which to manage their domestic economies.

Eighthly, countries should consider potentially significant transaction costs arising from the operation of regional integration. Discriminatory application of trade preferences under an RTA is often managed by the implementation of the '*rules of origin*' criterion. However, the exact rules for determination of the country of origin vary from jurisdiction to jurisdiction. In this regard, discriminatory preferences often make international trade more complex and costly for all relevant jurisdictions.

Lastly, deep economic integration involves not only the abolition of tariffs and custom duties but also elimination of non-tariff barriers, mainly through harmonisation.[130]

[128] (World Bank, 2000) notes that '*some African countries raise as much as one-half of government revenues from trade taxes*', p. 44.
[129] Ibid. (Meade, 1953) indicates three methods by which governments secure direct control over trade and payments: (i) accommodating finance from the surplus to the deficit countries within a union; (ii) deflation of money, income, costs and prices in the deficit regions and their inflation in the surplus regions (*note that monetary unions are considered a special case*); and (iii) variation of rates of exchange between the national currencies or union partners; pp. 29-55.
[130] Non-tariff barriers to trade can take various forms. For instance, as a part of its single market programme of 1992, the EU implemented five types of measure in order to ensure deep integration.

Policy harmonisation within a regional bloc may require, *among other things*, the establishment of new regional institutions, adoption of regional law, and reform of the domestic institutions and legislation of member states. Harmonisation, however, is often politically difficult and gives rise to significant expense.

Section 4.5 Political Motives for Regional Integration

The previous section has shown that welfare effects of regional integration strictly depend on the volume and dynamics of trade between the parties as well as between these and the ROW. Dynamics of the trade in a regional bloc might be affected by numerous factors, including changes in demand patterns, new product substitution options, changing product portfolios of the parties, internal and external politics, economic crisis, and natural disasters. Since the combined effect of such factors is not always predictable, the welfare implications of a regional integration are unlikely to be projected with full accuracy. Despite this economic uncertainty, there are political reasons that encourage sovereign states to enter into RTAs. The main political motives for RTAs are examined below.

4.5.1 Intra-regional security concerns

From the perspective of individual countries, a primary reason for entering into an RTA might be the promotion of intra-regional security through the establishment of strong economic ties between member states of the region. The link between regionalisation and promotion of peace might be explained on at least four grounds.[131]

Firstly, an RTA tends to increase cross-border trade within the borders of a region. Increased trade within a regional bloc may eventually create an economic interdependence between member states, which may in turn reduce the incentives of the parties to fight each other. In this regard, independent jurisdictions would have an interest in pursuing a stable political relationship with their major trading partners for the continuance of their economic transactions. An RTA is likely to lead to economic

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Accordingly, the EU simplified and partly abolished intra-EU border controls, introduced product standards, deregulated the transport sectors, encouraged region-wide competition for public procurement in member states, and deregulated the service sector including financial services and the right of establishment – (World Bank, 2000), p. 35.

[131] (Schiff & Winters, 2003), pp. 189-90.

inter-dependence between its member states to the extent that it creates 'new trade' within the region.

Secondly, increased cross-border trade within a regional bloc may help to establish closer ties and mutual trust between national governments (and possibly between their citizens). Increased intra-regional trade might promote common economic interests of the member states. The closer relationship between the parties might facilitate the regulation of common economic interests of member states through deeper economic integration by the harmonisation of further law and policy.

Thirdly, increased trade and trust within a regional bloc may improve the access of member states to one another's supplies of strategic raw materials, and thereby reduce the threat of trade embargo.

Fourthly, increased trust and at least partly resolved antagonism within a regional bloc might help to cut the national defence expenses of member states, which would in turn promote regional peace. Allocation of smaller resources to national security measures might be a result of lower conflict risk within the regional bloc and/or common security measures taken at the regional level. The resource savings can be used for other public interest purposes.

In light of the above, one may conclude that creating an interdependence between member states of a regional bloc may be the guardian of intra-regional security. In the literature, Immanuel Kant is suggested as the first philosopher who indicated the possibility of establishing '*perpetual* peace' on the basis of interdependence between sovereign nations.[132] In his 'Perpetual Peace: A Philosophical Essay' (1975), Kant suggested that perpetual peace between sovereign nations is capable of establishment through an international convention recognising the principle of universal hospitality.[133] For this purpose he proposed the supervision of cooperation between sovereign nations at a *supra-national* level, through the establishment of institutions with supranational legislative, executive and judicial authority.[134] Kant did not, however, make any specific mention of cross-border trade.[135]

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[132] (World Bank, 2000), p. 13; (Schiff & Winters, 2003), p. 189.
[133] (Kant, 1795).
[134] Ibid. To achieve perpetual peace, Kant stipulates the necessity of a set of compulsory measures which include the abolition of national standing armies, the establishment of republican states (i.e. states in which the executive and legislative powers are separated) and representative government (since only then will the elected serve the people's welfare rather than satisfy the desires of a leader, an elite or the

Intra-regional security concerns were at the forefront in the evolution of European integration together with the target of achieving economic growth in the region. The ideological architects of the EU, Jean Monnet and Robert Schumann, further developed Kant's proposal by suggesting the use of cross-border trade as a tool with which to create mutual trust and interdependence between sovereign nations. They considered that an economic integration in Europe '*would make war "materially impossible", meaning that interlocking steel, coal, and other strategic industries would leave countries unable to wage war against each other*'.[136]

According to Hung (2010) similar intra-regional security considerations were made concerning the establishment of the Association of Southeast Asian Nations (ASEAN).[137] According to the author, avoidance of pre-integration wars and other prolonged internal and external political conflicts was the main motive for the promotion of regional integration in the region. Regional conflicts were essentially rooted in political, legal and ideological diversity between the countries of the region. Due to such conflicts, countries in Southeast Asia needed to spend an important share of their national budgets on national security, and eventually became dependant on external aid.[138] The ASEAN, Hung notes, was established as '*an organization of non-communist countries including Indonesia, Malaysia, the Philippines, Singapore and Thailand, which came together to cooperate actively towards peace, stability, progress and prosperity in the region*'.[139]

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nobility), and having supra-national legislative, executive and judicial powers to reconcile the differences between the nation states peaceably.

[135] In (Kant, 1795) the only reference to trade is as follows: "*...as an opposing machine in the antagonism of powers, a credit system which grows beyond sight ... constitutes a dangerous money power. This ingenious invention of a commercial people ... in this century is dangerous because it is* ***a war treasure*** *which exceeds the treasures of all other states; it cannot be exhausted except by default of taxes which is inevitable,* ***though it can be long delayed by the stimulus to trade which occurs through the reaction of credit on industry and commerce****. This facility in making war, together with the inclination to do so on the part of the rulers –an inclination which seems inborn in human nature– is thus a great hindrance to perpetual peace. Therefore, to forbid this credit system must all the more be a preliminary article of perpetual peace, because it must eventually entangle many innocent states in the inevitable bankruptcy, and thus openly harm them*" [see, ibid. pp. 308-9 (emphasis added)]. Rather than seeing international trade as a tool by which to secure peace among nation states, Kant cites his concern at the use of the credit system for financing war. He argues that using credit to finance a war will eventually lead to the bankruptcy of the lending state, though such bankruptcy may be postponed by such state's tax revenues on industry and commerce.

[136] (World Bank, 2000), p. 13. See also, (Schiff & Winters, 2003), p. 189 and 195-6.

[137] (Lin, 2010), p. 821-2.

[138] Ibid.

[139] Ibid., p. 822. See also, (Schiff & Winters, 2003), p. 192.

Likewise, the promotion of regional peace, in particular that between Brazil and Argentina, is reported to be a core political motive for the establishment of the Common Southern Market (MERCOSUR).[140]

While increased trade might promote trust and peace between member states of an RTA, this outcome is not inevitable. Economic dynamics examined in the previous section have shown that regional integration necessarily causes trade flow between member states. Although trade flows can be manipulated by regional and/or national economic policies, in reality, due to the complex dynamics of globalised markets as well as the quest for favouring the national interest, distribution of economic gains among member states of an RTA is often not balanced. The imbalanced welfare implications of a regional integration might raise political tension and create rivalry between member states. Political tensions accompanied the early times of the East African Community (EAC) can be cited as an example.[141] The EAC was originally formed between Kenya, Tanzania and Uganda in 1967, with an aim of realising far-reaching economic integration and common infrastructural projects. The parties anticipated achieving a customs union, tax harmonisation and monetary union. However, the EAC eventually led to welfare transfers to Kenya from the other two member states. Since Kenya's national industries were more developed and the country had closer ties with developed economies (Kenya had been enjoying crown colony status)[142], the regional integration resulted in industrial agglomeration in Kenya. Industrial agglomeration, in turn, prompted welfare transfers between the member states. Although the EAC member states tried to enforce regional re-distributive measures against the welfare transfers (such as re-regulating intra-regional trade, and establishing a 'Distributable Pool' for the provision of financial compensation to the disadvantaged partners) none of the measures provided a sustainable solution.[143] Regional conflicts led to the dissolution of the EAC in 1977. Nevertheless, on 30 November 1999, Kenya, Uganda and Tanzania signed a new RTA, *the Treaty for Establishment of the East African Community*, which came into effect on 7 July 2000. In 2007 Rwanda and Burundi joined to this new Community. In 2010 the Community

[140] (Damro, 2006), p. 32.
[141] (Langhammer & Hiemenz, 1990), p. 44-6; (World Bank, 2000), p. 15.
[142] (Langhammer & Hiemenz, 1990), p.44-5.
[143] Ibid.

established a customs union; and until 2015 they aim to unite under an East African Federation.[144]

The Central American Common Market (CACM) is another example.[145] CACM was established in 1960 by *the General Treaty on Central American Integration*. The members of the CACM were Costa Rica, Guatemala, Honduras, Nicaragua, and El Salvador. Although the CACM successfully '*boosted intra-regional trade from 7.8 per cent of members' exports in 1961 to 24.2 per cent in 1968, the two poorest members, Nicaragua and Honduras, were dissatisfied with the distribution of benefits.*'[146] Due to the imbalanced distribution of welfare gains from the regional integration and following the war between Honduras and El Salvador, Honduras withdrew from the customs union and did not join the establishment of the standard commission of the union (which aimed to regulate the regular functioning of the meetings) in 1971.[147] At a later stage, on 13 December 1991, Central American states signed *the Tegucigalpa Protocol*, and formed the Central American Integration System (SICA). SICA is still operating to ensure '*peace, liberty, democracy and development*' in the region.[148]

However, besides imbalanced welfare gains from regionalism, pursuance of industrial policies based on import substitution were among the reasons that led to the collapse of the EAC of 1960s-70s and the CACM of 1960s.[149] As noted earlier, when high external trade barriers are combined with extensive protectionism, regionalism is likely to result in significant trade divergence, in particular in RTAs concluded between developing countries. In such regional blocs intra-regional welfare transfers often take place to the disadvantage of the poorer member state(s).[150]

Considering the centuries-long wars in the Europe's history and the persistent conflicts between the EU member states, in particular between France and Germany, one can confidently conclude that protecting intra-regional peace was one of the core motives of

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[144] See, http://www.eac.int (accessed on August 5, 2014).
[145] (Pomfret, 2001), p. 300-3.
[146] Ibid.
[147] (Zapata Marti, 2003), p.71-2.
[148] http://www.sica.int/sica/sica_breve_en.aspx?IdEnt=401&Idm=2&IdmStyle=2 (accessed on 18 November 2011)
[149] See, Section 4.2.2 above.
[150] A similar disadvantageous position for relatively poorer member states can be observed in relation to ASEAN (in late 1970s and early 1980s) and the Caribbean Free Trade Association (CARIFTA – lasted from 1958-62). See, (Pomfret, 2001), pp. 300-3. [The CARIFTA was transformed to the Caribbean Community (CARICOM) in 1973. CARICOM is still effective and its member countries continue negotiating a deeper integration aimed at eventually forming an economic union.]

the member states of the EU. Concerning the difference between the European integration process and the regional blocs founded by developing countries in 1960s-80s, a World Bank study states that:

> '*The genius of the European Community has not simply that it promoted regional integration but that it did so without generating the large transfers that trigger conflict.*'[151]

After a similar statement, Winters (1997) describes this outcome as a result of the design of the EU's internal decision-making procedure and the compromising attitude adopted by the member states in internal negotiations.[152] A notable exception, however, has been the common agricultural policy of the EU.[153] As regards the early years of the European integration this exception might be explained as a strategic choice of the parties aimed at securing agricultural self-sufficiency against a possible risk of embargo in the Cold War period.

Although the European integration did not lead to intolerable income flows within the region in its early years, significant gaps have emerged between the economic welfare of member states, in particular following the creation of the Eurozone and the Eastern enlargements of 2004 and 2007. This also indicates the difficulty of making long-term projections on the welfare implications of regional integrations due to ever-changing economic and political dynamics affecting both national and international product markets.

Nevertheless the above discussion suggests that promotion of intra-regional security is among the core political reasons for encouraging sovereign countries to enter into RTAs. However, regionalism seem to promote peace between member states of a regional bloc only when national political interests of member states show a degree of coherence and differences in the distribution of gains from regional integration between member states are not intolerably large.

4.5.2 Extra-regional security concerns

Extra-regional security may also be a major consideration for sovereign jurisdictions when entering into an RTA. Typically, extra-regional security concerns play a role

[151] (World Bank, 2000), p. 15. A similar comment can be found in (Schiff & Winters, 2003), p. 195.
[152] (Winters, 1997), pp. 895-9.
[153] Ibid. (World Bank, 2000), pp. 15-6.

when a group of countries with small economies face an economic, political and/or military threat of a third country which tends to be the dominant economic power in the region.

An RTA can be formed to reduce the *economic dependence* of member states on a regional dominant power, and to improve the international competitiveness of domestic industries of member states. For instance, extra-regional security was a key factor in the formation of the South African Development Coordination Conference (SADCC). The SADCC was founded by Angola, Botswana, Mozambique, Zambia, and Tanzania on April 1, 1980, and later on Malawi, Lesotho, Swaziland, and Zimbabwe joined to it.[154] A primary motive of the member states when forming the SADCC was to reduce their economic dependence on the dominant regional power, South Africa.[155] Accordingly, the SADCC aimed to increase the economic security of the member states.

Alternatively, extra-regional security concerns may relate to *political governance* conflicts within a regional bloc. Countries may wish to enter into an RTA to combine their resources in order to protect the political regime embraced by all member states and opposed by third countries.[156] The ASEAN is an example of regional blocs in which member states were also motivated by common political governance concerns. A key objective in the formation of the ASEAN was to strengthen the ASEAN member states against the threat of Chinese supported communist insurgencies.[157]

Lastly, an RTA may be designed to *supress direct external threats to domestic borders of member states*. The Cooperation Council for the Arab States of Gulf (CCASG, a.k.a. the Gulf Cooperation Council) is one example of such regional integration. The CCASG was formed by the United Arab Emirates, State of Bahrain, Kingdom of Saudi Arabia, Sultanate of Oman, State of Qatar and State of Kuwait on May 25, 1981. The CCASG anticipates deep integration of various policies including finance, trade,

[154] The SADCC is transformed into the South African Development Community (SADC) by the execution of the SADC Treaty and Declaration on August 17, 1992 (http://www.sadc.int/about-sadc/; accessed on 21 November 2011).
[155] (Langhammer & Hiemenz, 1990), p. 46; (Damro, 2006), p. 32; (World Bank, 2000), p. 16; (Schiff & Winters, 2003), p. 203; (Shams, 2003), p.23.
[156] Such political governance concerns were particularly relevant to the two-pole world of the Cold War period.
[157] (Damro, 2006), p.31-2; (World Bank, 2000), p. 17; (Schiff & Winters, 2003), p. 203; (Lin, 2010), pp. 821-2 and 827-9. In this respect, (Abad, 2012) suggests that ASEAN was initially created not for economic integration but for political and security reasons; see pp. 42-3.

customs, health, education, tourism and foreign investment in the Arabian Gulf.[158] One motive driving the CCASG member states at the initial stage of the regional integration process was suggested to be strengthening the position of the CCASG member states against external threats including '*Iranian Revolution of 1979, Soviet invasion of Afghanistan, and the war between Iraq and Iran*'.[159]

4.5.3 New security needs

In addition to the traditional internal and external security concerns it is suggested in the literature that sovereign jurisdictions may enter into deep RTAs in the interest of meeting the '*new security needs*'. Damro (2006) explains that these are '*concerned with emerging causes of instability and threats to security, such as environmental damage, illegal migration, organised crime, drug smuggling and international terrorism*'.[160]

New security concerns might have played a role in the North American Free Trade Agreement (NAFTA) of January 1, 1994 between US, Canada and Mexico. An indicator is Article 104 of the NAFTA which directly refers to environmental standards. In most cases the reason for including new security provisions in an RTA is to ensure coherence of relevant national legislations and harmonise the standards applied by member states in relation to respective policy areas. Member states with higher standards may request harmonisation of certain cost-generating standards to ensure equal access of their domestic firms to the relevant regional markets. In RTAs between developed and developing countries in particular, new security provisions often aim to align the protection provided in the domestic law of the respective developing countries with the level of protection required under the laws of the developed countries of the region. For instance, the primary purpose of Article 104 of the NAFTA was to improve Mexico's domestic standards of environmental protection.

The Free Trade Area of the Americas (FTAA) might be another example of RTAs that include provisions related to new security concerns. The FTAA is a long-term project that ultimately aims at uniting the economies of thirty-four states in the Americas. The

[158] See, http://www.gcc-sg.org/eng/index895b.html?action=Sec-Show&ID=3 (accessed on 19 November 2011).
[159] (Karns & Mingst, 2004) as quoted from (Damro, 2006), p. 32. See also, (World Bank, 2000), p. 17 and (Schiff & Winters, 2003), p. 203.
[160] (Damro, 2006), p. 32-3, see also the references therein. Damro submits that such concerns are classified as '*new*' only because the academic literature has only recently started to recognise the influence of these new security issues.

FTAA was initiated by the First Summit of the Americas held in Miami in 1994.[161] Parties to the FTAA pursue regional cooperation in various economic and non-economic policy areas. In the Sixth Summit of Americas (held at Colombia in 2012) the objectives of the regional integration were extended to issues of poverty and natural disaster risk reduction, citizen security, infrastructure cooperation, transnational organised crime, human development, etc.[162] However, so far the regional integration process has been slow partly due to a lack of mutual confidence in the FTAA member states.

Like the FTAA, the CARICOM also anticipates regional integration in certain social and political spheres besides economic integration. In Article 6 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy[163], objectives include enhanced cooperation in the advancement of social, cultural and technological development, and '*intensified activities*' concerning health, education, transport, telecommunications etc.[164]

In relation to the 'new security needs', Schiff and Winters (2003) make a narrower case and suggest that '*formation of an RTA is sometimes seen as a means of preventing or reducing the spread of civil disturbances or civil war from neighbouring nations or of controlling migration flows*'.[165] The authors explain that rich countries may seek to form regional integrations with poorer countries in order to prevent large-scale migration flows from the latter. Rich countries may pursue regional integration for the purpose of strengthening intra-regional trade and thereby promoting the economic wealth of their less developed regional partner(s). However, given the NAFTA and its effects on migration flows between Mexico and the U.S., Schiff and Winters (2003) show that regional integration may not reduce migration from poorer to richer member states. On the contrary, RTAs may increase the ability of people to emigrate.[166]

[161] See http://www.ftaa-alca.org/View_e.asp (accessed on August 31, 2013).
[162] For the full report, see, http://www.summit-americas.org/SIRG/2012/041412/mandates_sc_en.pdf (accessed on August 31, 2013).
[163] Available at http://www.caricom.org/jsp/community/revised_treaty-text.pdf (accessed on November 21, 2011).
[164] On a separate point, all member states of the CARICOM are developing countries. Therefore the CARICOM proves that *new security concerns* can also be acknowledged by developing countries themselves, without any direct imposition from advanced economies. See, (Damro, 2006), p. 33.
[165] (Schiff & Winters, 2003), p. 196.
[166] Ibid. p. 196-8.

Although some RTAs explicitly refer to the so-called *new security needs*, the weight attached to such regional policies relative to more traditional objectives attributed to regional integrations (i.e. economic development and internal and external security) is likely to be minor. Furthermore, as mentioned above, introducing certain social and environmental regional standards might also be explained on economic grounds such as the elimination of inequalities in trading conditions across a regional bloc.

4.5.4 Locking-in domestic reforms

RTAs may oblige member states to comply with a set of common policies and to reform their domestic legislation concerning certain economic and non-economic areas. To ensure compliance RTAs usually include explicit enforcement and sanctioning mechanisms. Due to the pressure regional sanctioning mechanisms put on national governments of member states RTAs may prevent the reversal of compulsory domestic reforms made in member states upon government change or influential national lobbying campaigns.

Most commitments under an RTA usually concern domestic trade policies of member states. A commonly cited example of the lock-in effect of RTAs concerns the domestic reforms that took place in Mexico following the conclusion of the NAFTA. As NAFTA required liberal trade and finance policies, Mexico made significant reforms to its domestic policies in 1990s, and these reformed policies are largely preserved today. One reason for the resilience of liberal trade and finance policies imposed upon Mexico by NAFTA is the irreplaceable trade advantages Mexico gets from trading with the other NAFTA member states.[167] Mexico's non-compliance with NAFTA might endanger its free access to the markets of its historically largest trading partner, the US, as well as to the markets of Canada. It might also endanger the occasional financial and technical assistance provided to Mexico by the other two NAFTA member states. In light of this example one might conclude that long-term compliance with the requirements of an RTA may increase in parallel with the significance of gains from the respective RTA.

In order to test the effect of NAFTA on the credibility of Mexico's liberal trade reforms Schiff and Winters (2003) compared the behaviour of Mexico during its 1982 (pre-

[167] (World Bank, 2000), p. 24-6; (Damro, 2006), p. 36-7.

NAFTA) and 1994 (post-NAFTA) debt crises.[168] The authors observed that before NAFTA, in the 1982 debt crisis, the Mexican government swiftly removed some of its then recent liberal reforms and returned to interventionist policies in the management of its national economy. These policies in response to the 1982 crisis included nationalisation of the banking system, regulation of foreign-exchange controls, adoption of a universal regime of import-licensing requirements and interventions in foreign investment.[169] By the end of the crisis, and in particular after joining the GATT and the NAFTA, Mexico again reduced its tariffs and greatly liberalised its trade policies. Mexico survived its second big crisis in 1994, though this time without reversing its liberal trade policies. Although it raised the tariffs for certain non-NAFTA imports, Mexico did not return to protectionist policies to the extent it did during the 1982 crisis. At this time, however, Mexico was offered a $15 billion rescue package by the US government[170] which had surely given an important incentive for preserving its liberal trade policies.

Besides trade-related reforms, RTAs may persuade participating states to adopt reforms on core political governance issues such as strengthening democracy and political institutions. A prominent example is the '*democracy commitment*' required from all MERCOSUR member states. An explicit rule on democracy was found necessary by the MERCOSUR member states following an attack on the fragile democracy in Paraguay in 1996. Its democratic regime was threatened by the Paraguayan armed forces that wanted to overthrow President Juan Carlos Wasmosy.[171] Paraguay's move towards dictatorship was avoided with the help of the explicit opposition of the other MERCOSUR member states, particularly of Brazil and Argentina, to a dictatorship.[172] This event led to the adoption of the Presidential Declaration on the Democratic Commitment in MERCOSUR, signed by the then four member states of the regional bloc (i.e. Argentina, Brazil, Paraguay and Uruguay) on June 25, 1996. The declaration, still in force today, rules that adherence to the principles of democracy is a compulsory requirement of membership of the MERCOSUR.[173] It provides that '*any change in the democratic regime constitutes an unacceptable obstacle to the continuation of the*

[168] (Schiff & Winters, 2003), p. 109.
[169] Ibid.
[170] Ibid. See also, (World Bank, 2000), p. 24-6.
[171] (Peña, 1997), p. 8-9.
[172] Ibid.
[173] By joining to MERCOSUR in 1998 Bolivia and Chile also became subject to the 'democracy commitment'.

process of integration underway with respect to the affected member state.'[174] Against noncompliance the declaration stipulates a negotiation procedure among member states, as well as a range of sanctions, varying from suspension of the right to participate in the organs of the various agreements to suspension from MERCOSUR.[175] More recently in 2012 Paraguay was accused of not adhering to its democracy commitment because of the allegedly unconstitutional impeachment of then-President Fenando Lugo.[176] As a result Paraguay was suspended from the MERCOSUR between June 2012 and December 2013.[177]

As noted above, the 'lock-in effect' clearly depends on individual gains of each member state from the regional integration, and, on the deterrence level of the commitment mechanisms under an RTA. One may fairly conclude that countries would be more agreeable to strict commitment mechanisms if economic and political gains from regional integration are sufficiently high. Besides, the general attitude of member states towards regional integration is crucial. If they treat their commitments under an RTA as flexible and lax, then the '*lock-in effect*' will clearly not work. An example is the membership of some sub-Sahara African states to multiple RTAs with conflicting policy provisions, and in line with this, their lack of commitment to the regional integration processes.[178]

RTAs between developed and developing countries may achieve higher compliance rates since the developed partner(s) might have the necessary bargaining power to persuade the developing regional partner(s) to agree to more strictly defined policy commitments and sanctioning mechanisms. The stronger negotiating power of developed countries might derive from their superior buying power, investment capital, R&D stocks and technology transfer potential. Yet even RTAs between developed and developing countries may have flexible policy designs, in particular when intra-regional trade levels and other common interests of the parties are not significant.

On the other hand, a regional integration between a developed and a developing country might be valued differently by the two member states. The RTA might greatly increase the potential trade gains for the developing partner while its effect might not be so

[174] (Peña, 1997), p. 8.
[175] (Schiff & Winters, 2003), p. 199.
[176] (BBC (Vladimir Hernandez), 2012).
[177] See, (MercoPress, 2014).
[178] See (Gathii, 2010) on African countries' appreciation of RTAs as flexible legal regimes, in particular pp. 587-92 and pp. 660-6. Chapter 5 examines this issue further.

significant from the perspective of the much larger economy of the developed partner. In such a case the developing country may still have a greater incentive to comply with the RTA.[179]

Gaining credibility in international platforms might be an additional reason for developing countries to enter into an RTA even when the trade between member states is unlikely to generate *high* economic returns to the developing partner. In the latter case the RTA might still be economically desirable since increased international credibility might also attract FDI inflows from third party investors.

Here the question arises whether multilateral organisations, such as the WTO, could provide better and stronger commitment mechanisms than that of bilateral or multilateral RTAs. Concerning facilitation of international trade, the WTO enforcement mechanisms are arguably stronger, and therefore more effective, than those found in many regional agreements.[180] However, as pointed out by Schiff and Winters (2003), any commitment to democracy and political institutions remains simply beyond the mandate of the WTO.[181] Although the United Nations and some other multinational organisations might be able to persuade developing countries to abide by some rules, Schiff and Winters indicate that so far these do not include democracy and other constraints on political regimes.[182]

Although stricter commitment mechanisms under the control of a multinational organisation might appear desirable for ensuring compliance, four issues may still be problematic. Firstly, big multinational organisations might be more prone to red tape due to the number of the cooperating jurisdictions and the vast scope of the policy areas they might cover. This may in turn undesirably lengthen the dispute resolution processes. Secondly, members of each RTA may desire a different level of flexibility in their policy commitments. As noted above, the degree to which a state desires to be

[179] (B. Hoekman & Winters, 2009) doubt that RTAs are the main drive behind liberal reforms. According to the authors '*evidence that PTAs drive reform is not compelling. One can more convincingly argue that unilateral policy reforms and/or exogenous developments (e.g. technological change) allow commitments to be made in the PTA context.*' Ibid., pp. 657-63.
[180] (World Bank, 2000), p. 23. See also, (B. M. Hoekman & Kostecki, 2001), pp. 439-40. From the perspective of competition policy, however, the authors suggest that before inclusion of competition policy issues on the WTO agenda domestic competition law regimes and institutions need to obtain substantial national experience (ibid., pp. 424-34). – Guzman disagrees by arguing that the WTO is the most proper forum for negotiating international competition law principles also because of its dispute resolution system. See, (Guzman, 2007), pp. 439-41.
[181] (Schiff & Winters, 2003), p. 201.
[182] Ibid.

bound by its supra-national commitments is a function of the extent of economic or other benefits it expects to get from this international cooperation. As long as a multinational organisation is not established in connection to a fairly deep RTA [which goes beyond a statement of an intention towards international free trade, and effectively reduces trade restrictions in a large area], participating countries might be unwilling to be subject to a strong sanctioning mechanism controlled by a multinational institution. However, concerns for international reputation and other political dynamics might increase the attraction of such commitments to individual jurisdictions. Thirdly, as the scope of a multinational cooperation regime (i.e. the number of the participating states) increases, the trust between the parties may decrease. This effect relates to less direct or less frequent inter-action between the individual parties. Fourthly, when the economic gaps between the parties are very large, more advanced jurisdictions might be able to exercise disproportionate influence on the operations of the multilateral organisations, which might result in under-representation of the economically or otherwise less significant jurisdictions.[183] Lastly, policy reform requirements and strict commitment mechanisms under an RTA might not be sufficient to make a noticeable impact on the economic outlook of its member states. The independent ability of an RTA to grant credibility to its member states might be limited.[184]

4.5.5 Increased bargaining power & getting noticed

Section 4.3.5 above demonstrated that regional integration might increase the bargaining power of member states in international negotiation on trade. In this regard member states of a regional bloc may exercise their bargaining power either by joint representation or by 'logrolling' (i.e. voting in favour of one another). Such bargaining advantages can be used in negotiation of trade preferences and other economic or non-economic policies.

From a political perspective, collective action of a regional bloc aimed at enjoyment of increased bargaining power may have two important benefits that are especially relevant to developing countries. Firstly, regional integration may help developing countries to receive more financial and/or technical aid from external sources such as international

[183] See (Woods, 2008) for an assessment of the role and the practice of the World Bank as well as the IMF, in conjunction with the globalisation, from the perspective of developing countries.
[184] See (Winters, 1998), p. 63 – '*Greece has been a member of the EU since 1981 and yet subject to serious macroeconomic shortcoming.*'

organisations and developed jurisdictions.[185] External sources might be more willing to provide financial support to regional projects on developing an infrastructure, overcoming pollution, the efficient use of cross-border national resources (rivers, etc.) or other industrial projects of regional interest due potential cost savings from and potentially more significant benefits of region-wide action. For these reasons developed economies or international organisations may encourage regional integration between developing countries. In this regard the EU's encouragement of regional integration in the Mediterranean and Central Africa might be cited as an example.

Secondly, regional integration might help developing countries to pool their diplomatic resources and thereby to leverage their voice in international negotiations. Regional cooperation might be the only way in which some developing countries, in particular micro-sized or land-locked economies, can '*get noticed*' at the international level and have the chance to get their representatives elected to key international positions.[186] Consisting of 15 very small states[187], CARICOM is a good example that demonstrates increased international influence as a result of regional integration. Due to the small or micro size of the national economies of the CARICOM member states, economic activities across the CARICOM region are often less competitive and export-orientated. Because of the problems accompanying the smallness of their economies regional integration has been considered a necessity by the CARICOM member states since they gained their independence.[188] Over time CARICOM member states have also established a tradition of joint representation as a result of which the respective states have been influential in international negotiation, beyond the individual capability of any CARICOM member state.[189] They have also contributed to the recognition of the

[185] (Damro, 2006), p. 34-5.
[186] Ibid. p. 34-5; (World Bank, 2000), p. 19-20.
[187] With the exception of Haiti, Jamaica, and Trinidad and Tobago, the population of each member state of CARICOM is below 1 million.
See, http://www.caricom.org/jsp/community/member_states.jsp?menu=community; accessed on 24 November 2011.
[188] (Byron, 1994), p. 5.
[189] CARICOM representatives took the lead in formulating and articulating the African-Caribbean-Pacific Group (APC) and secured their regional interests therein (see, ibid, p.8). Furthermore, the representatives of CARICOM actively participated in the negotiations between the APC countries and the EU, and in the negotiations with the GATT/WTO, the proposed Free Trade Area of the Americas, the United Nations Conference on Trade and Development (UNCTAD), and the United Nations Convention on the Law of the Sea (UNCLOS). CARICOM has also taken part in commissions or joint councils with Canada, Cuba, Japan, Mexico, the United States, the Organisation of American States, and the Group of Three. See, (Schiff & Winters, 2003), p. 205.

specific problems of small, weak and dependant island states all over the world, and secured important trade preferences in favour of their region.[190]

4.5.6 Marginalisation Syndrome

Damro (2006) suggests a further political motive concerning regional integration between developing countries only. He notes that '*typically countries that are politically weak, geographically isolated, and/or economically dependent*' enter into RTAs '*because they fear being left out, or marginalised, from important international economic and political developments.*'[191] Damro explains this fear of marginalisation as an almost psychological response of economically and politically vulnerable countries to regional integration taking place elsewhere in the world. Accordingly, vulnerable countries might consider that regional integration happening elsewhere might ameliorate members' economies while further deteriorating theirs.[192]

In his article Damro does not offer any real-world examples of the marginalisation syndrome. Therefore it is hard to appreciate the actual impact of the marginalisation syndrome. However, poorly drafted RTAs signed by developing countries might be interpreted as an indicator of such futile political concerns.

Independent from Damro's above suggestion, from an economic perspective, proliferation of RTAs might increase the incentives to enter into RTAs as remaining outside might become costly for non-members (i.e. domino regionalism).[193]

4.5.7 Strong lobbies & individual voters

National governments might also consider entering into an RTA to meet the pressure of strong lobby groups or individual voters. Such groups, in particular those formed and/or supported by exporters of goods and services within a region may organise influential campaigns promoting the benefits of an RTA.[194] As discussed in Section 4.3 above, regional integration may lead to intra-regional trade diversions especially when regional partners keep their external tariffs high. Local businesses, which would benefit from

[190] (Byron, 1994), p. 8.
[191] (Damro, 2006), p. 30.
[192] Ibid.
[193] (Baldwin, 1997), pp. 877-83.
[194] (World Bank, 2000), p. 26-7.

trade diversions, may put national governments under pressure to conclude an RTA with such influence.

From the perspective of individual voters, RTAs might be preferable to unilateral liberalisation of national trade.[195] Due to the provision of trade preferences on a reciprocal basis under RTAs, individual voters may more easily accept the potential benefits of trade liberalisation. Accordingly, some citizens who might know less about the dynamics of international trade might not be agreeable to the idea of the state's provision of a benefit to other states without having anything in return.[196] Therefore politicians and bureaucrats might more easily be able to justify trade preferences to the public when they are provided on reciprocal basis.

Politicians may also seek to remit unpopular policies to a supra-national body in order to preserve the sympathy of voters in the next election. In this regard Langhammer and Heimenz (1990) note that:

> '…public choice theory and the theory of political economy suggest that policymakers are rationally acting agents which [sic] maximise their individual benefits rather than those of the community… Under the objective of maintaining power it is rational to shift so-called 'dirty jobs' to the supranational body and to deny own responsibility. These 'jobs' are policies which benefit relatively small interest groups at the expense of the majority of voters such as sector specific tariffs and subsidies.'[197]

However, the authors also acknowledge the income redistribution effect of group-specific policies. Depending on the subject of the discriminatory policy, the willingness of politicians to take responsibility for public policies will depend on whether the appreciation of the targeted group is likely to overcome the opposition of the rest of the public.[198]

Section 4.6 The Economic Focus of Regional Integration

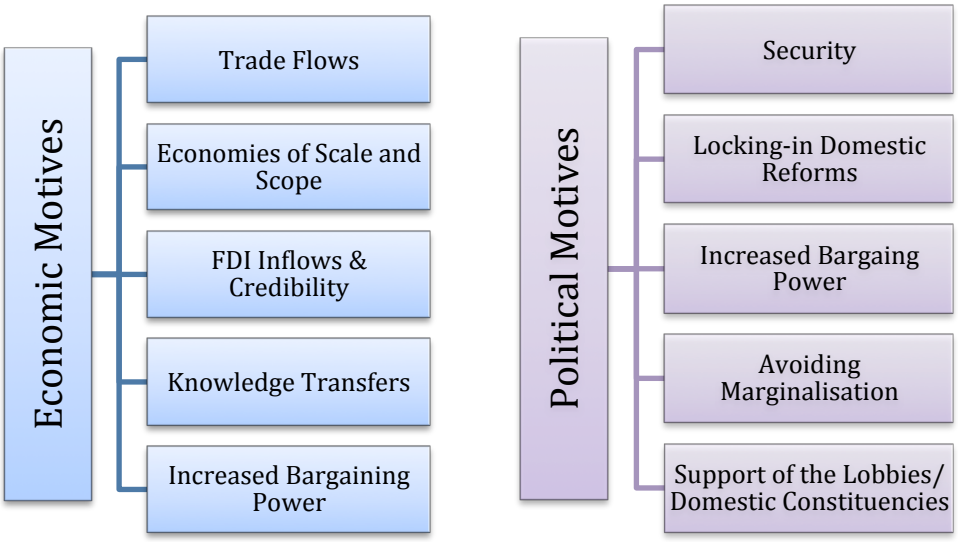
Previous sections have set forth the major economic and political motives of sovereign states to enter into an RTA. A major implication of the above discussions is that economic expectations lie at the heart of all RTAs. This is also evident from the fact

[195] (Damro, 2006), p. 37-8.
[196] Ibid.
[197] (Langhammer & Hiemenz, 1990), p. 11-2.
[198] Ibid.

that elimination of barriers to trade is the only common feature of all regional integrations of all depths.[199] With respect to political motives all reasons but '*security*' appear to be of secondary importance. For example, any sovereign state will be unwilling to enter into an international agreement with *heavy* burdens such as those under a deep RTA just to '*lock-in domestic reforms*'. Therefore the respective motive appears to be rather a side effect of a successful RTA. The same can be said for '*avoiding marginalisation*' and '*gaining the support of lobbies/domestic constituents*'. The former motive may be related to political psychology, and may not necessarily concern the functioning of RTAs. The latter motive, on the other hand, is mainly a reaction of governments to special interests of certain groups. These special interests might derive from special economic expectations, or political habits and behavioural codes. However, this latter motive can also not be directly related to the functioning of RTAs. Likewise, although increased bargaining power can bring substantial advantages to member states of an RTA, there is no obstacle to the establishment of a similar regional cooperation mechanism outside an RTA.

In contrast to the other political motives, '*security*' concerns seem to play a primary role in the formation of regional integration. This can also be confirmed by the open references to regional peace in the founding treaties of various regional blocs, such as COMESA (Article 3 of the COMESA Treaty), and ASEAN (Article 1 of the ASEAN Charter). A closer look at the *security* motive, however, reveals that regional integrations are designed to remove regional conflicts and to promote peace mainly by way of creating *economic inter-dependence* between member states, as well as between member states and the ROW.

[199] One exception might be '*silent integration*', which is a rather new concept. Silent integration means physical integration of the infrastructure which can be realised even in the absence of a traditional regional economic integration agreement (i.e. an RTA). Supporters of silent integration note that integration of certain key facilities may gradually increase common economic interests of the cooperating states, and may develop closer ties between the relevant people and political actors in the longer term. As political tension between the cooperating states of such integration is likely to be low due to exclusion of national sovereignty concerns and economic inequalities at the early stages, silent integration might pave the way to a deep economic integration. In this context, see (Sánchez & Tomassian, 2012)'s explanations on infrastructure integration in UNASUR.



Even when regional integration does not strengthen internal trade within a regional bloc it may protect the (internal and external) security of member states by promoting trade and ensuring their better integration in international markets. This shows that economics lies at the heart of the functioning of regional integration.[200] In the absence of economic gains regional integration is unlikely to be useful in solving political problems of a regional bloc. Yet the focus on economics in the functioning of RTAs should not be interpreted as exclusion of the crucial role of politics, and institutions in particular, from the practicability of a regional integration system. The above analysis has shown that an RTA requires long-term compliance of all member states with regional standards and harmonised policies. In other words elimination of economic and non-economic barriers to intra-regional trade requires constant political commitment, adequate resources, reliable institutions and domestic enforcement capacity in all member states.

Section 4.7 The Role of Competition Policy in Regional Integrations

The above discussion on motives for regional integration makes no direct reference to competition policy. Despite this, as mentioned in the previous section, economic expectations lie at the heart of regional integration. Given this vital role of economics,

[200] The claim that the ASEAN was first established for political reasons without an intention for economic integration [in this respect, see (Abad, 2012), pp. 41-2] does not negate the above conclusion. Abolition of trade barriers is to some extent an absolute requirement for defining a regional arrangement as an RTA. In this respect, a regional agreement with purely political objectives (such as increasing the participating states' bargaining power in international/regional negotiation) cannot be considered an RTA. The improvement of economic cooperation in ASEAN, however, over time led to the conclusion of a free trade agreement between the member states.

competition policy also gains priority with its key function: the protection of fair trading, and hence of competition in free markets of a regional integration. In this context, however, competition policy is not a goal of economic integration but rather holds a vital supportive function of ensuring undisrupted trade flows and occurrence of other economic and non-economic gains. A closer look at the founding treaties of some existing RTAs also confirms the supportive function of competition policy.

As the focus of this thesis is '*regionally integrated competition enforcement systems in deep RTAs*', the role of competition policy in regional integrations will be examined in the following paragraphs on the basis of deep RTAs concluded between developing countries. With respect to shallow RTAs, however, the role of competition policy is often significantly more limited. In this regard, as discussed in Chapter 3 above, competition policy commitments of member states under shallow RTAs often do not go beyond a requirement to adopt a national competition law and enforcement system.

The revision of six deep RTAs between developing countries that establish a regionally integrated competition law enforcement system (i.e. CARICOM, COMESA, CEMAC, CAN, WAEMU, MERCOSUR) shows that competition policy is seen not as an objective in its own right, but rather as a complementary policy for the fulfilment of broader economic and social integration objectives. In this regard, the founding treaties of two of the above RTAs, COMESA and CAN, do not make any reference to competition policy in their provisions that state the objectives of the respective regional integrations. The remaining four RTAs (i.e. CARICOM, CEMAC, WAEMU and MERCOSUR) refer to '*competitiveness*' in the objectives provisions of their founding treaties. Although such reference gives a clear legal ground for adopting a regional competition law and enforcement system, this is not an absolute requirement for promoting regional competitiveness. At the same time one cannot assume that a carefully drafted and well-enforced regional competition law regime will alone ensure regional competitiveness. In other words, a successful regional competition law regime can play only a small role in strengthening local industries and improving the competitiveness of a regional bloc. To achieve the '*competitiveness*' objective, member states have to develop coherent trade and investment policies, implement subsidies and other encouragement mechanisms for promoting investment and improving (hard and soft) infrastructure, etc. Therefore it is believed that competition policy should not be considered to be a goal in itself concerning the respective regional integrations. Rather,

competition policy should be seen as an instrument that works towards the fulfilment of the core objectives of such deep regional integrations.

Regional Bloc	*Objectives of the Regional Integration (As Stated in the Foundation Agreement)*
CARICOM	**REVISED TREATY OF CHAGUARAMAS (RTC)**[201] **Article 6: Objectives of the Community** The Community shall have the following objectives: (a) improved standards of living and work; (b) full employment of labour and other factors of production; (c) accelerated, co-ordinated and sustained economic development and convergence; (d) expansion of trade and economic relations with third States; (e) enhanced levels of international competitiveness; (f) organisation for increased production and productivity; (g) the achievement of a greater measure of economic leverage and effectiveness of Member States in dealing with third States, groups of States and entities of any description; (h) enhanced co-ordination of Member States' foreign and [*foreign*] economic policies; and (i) enhanced functional co-operation, including - (i) more efficient operation of common services and activities for the benefit of its peoples; (ii) accelerated promotion of greater understanding among its peoples and the advancement of their social, cultural and technological development; (iii) intensified activities in areas such as health, education, transportation, telecommunications.
COMESA	**COMESA TREATY**[202] **Article 3: Aims and Objectives of the Common Market** The aims and objectives of the Common Market shall be: (a) to attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development of its production and marketing structures; (b) to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples and to foster closer relations among its Member States; (c) to co-operate in the creation of an enabling environment for foreign, cross border and domestic investment including the joint promotion of research and adaptation of science and technology for development;

[201] The objective of the CARICOM competition policy is explicitly stated in Protocol 8 of the above agreement: "*Article 30(a) Objectives of Community Competition Policy*
1. The goal of the Community Competition Policy shall be to ensure that the benefits expected from the establishment of the CARICOM Single Market and Economy (CSME) are not frustrated by anti-competitive business conduct."

[202] Available at: http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf (accessed on September 4, 2013).

	(d) to co-operate in the promotion of peace, security and stability among the Member States in order to enhance economic development in the region; (e) to co-operate in strengthening the relations between the Common Market and the rest of the world and the adoption of common positions in international fora; and (f) to contribute towards the establishment, progress and the realisation of the objectives of the African Economic Community.
CEMAC	**THE CONVENTION GOVERNING THE ECONOMIC UNION OF CENTRAL AFRICA (UEAC)**[203] **Article 1** By this Convention, the High Contracting Parties [hereby] create among themselves the Economic Union of Central Africa, hereinafter Economic Union, in order jointly to establish the conditions for economic development and social harmony in the course of an open market and an appropriate legal environment. **Article 2** For the purposes stated in the First Article and in the conditions laid down in this Convention, the Economic Union aims to achieve the following objectives: (a) to strengthen the competitiveness of economic and financial activities by harmonizing rules governing their operation; (b) to ensure convergence towards sustainable performance by coordinating economic policies and by putting national fiscal policies into coherence with the common monetary policy; (c) to create a common market based on free movement of goods, services, capital and persons; (d) to establish a coordination of national sectorial policies, to implement common actions and to adopt common policies, particularly in the following areas: agriculture, livestock, fisheries, industry, trade, tourism, transport, telecommunications, energy, environment, research, education and professional education.
ANDEAN COMMUNITY (CAN)	**CARTAGENA AGREEMENT** **Article 1.** The objectives of this Agreement are to promote the balanced and harmonious development of the Member Countries under equitable conditions, through economic and social integration and cooperation; to accelerate their growth and the rate of creation of employment; to facilitate their participation in the process of regional integration, looking ahead toward the gradual formation of a Latin American Common Market. Likewise, this Agreement seeks to reduce external vulnerability and to improve the position of the Member Countries within the international economic context; to strengthen subregional solidarity, and to reduce existing differences in the levels of development among the Member

[203] The author's translation.

	Countries. The fulfilment of these objectives shall lead to an enduring improvement in the standard of living of the Subregion´s population.
WAEMU	**WAEMU TREATY** [204] **Article 4** Without prejudice to the objectives defined in the Treaty of ECOWAS, the Union pursues, under the conditions laid down in this Treaty, the following objectives: a) to strengthen the competitiveness of economic and financial activities of Member States in the course of an open and competitive market and a legal environment which is rationalized and harmonized; b) to ensure the convergence of economic performance and policies of Member States through the establishment of a multilateral surveillance procedure; c) to create between Member States a common market based on free movement of persons, goods, services, capital and the right of establishment of persons occupying independent [self-employed] or employed activities, as well as a common external tariff and a common commercial policy; d) to establish a coordination of national sectoral policies, by setting implementation of joint actions and possibly common policies, particularly in the following areas: human resources, land use (regional) planning, transport and telecommunications, environment, agriculture, energy, industry and mining; e) to harmonize, to the extent necessary for the proper functioning of the common market, the legislation of Member States and particularly the system of taxation.
MERCASUR	**TREATY OF ASUNCION** **Article 1** The States Parties hereby decide to establish a common market, which shall be in place by 31 December 1994 and shall be called the "common market of the southern cone" (MERCOSUR). This common market shall involve: The free movement of goods, services and factors of production between countries through, inter alia, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures; The establishment of a common external tariff and the adoption of a common trade policy in relation to third States or groups of States, and the co-ordination of positions in regional and international economic and commercial forums; The co-ordination of macroeconomic and sectoral policies between the States Parties in the areas of foreign trade, agriculture, industry, fiscal and monetary matters, foreign exchange and capital, services, customs, transport and communications and any other areas that may be agreed upon, in order to ensure proper competition between the States Parties;

[204] The author's translation.

	The commitment by States Parties to harmonize their legislation in the relevant areas in order to strengthen the integration process. **Article 4** The States Parties shall ensure equitable trade terms in their relations with third countries. To that end, they shall apply their domestic legislation to restrict imports whose prices are influenced by subsidies, dumping or any other unfair practice. At the same time, States Parties shall co-ordinate their respective domestic policies with a view to drafting common rules for trade competition.

Identification of the role of competition policy in any deep RTA is important to understanding the expectations of national governments from the respective policy, and the requirements for tailoring the right policy design. It can be argued that the supplementary role of competition policy should not have any effect on the goals of the competition policy itself.[205]

A holistic approach to law, however, would require consideration of the purposes of specific legislation in the broader context that the respective legislation is expected to serve. In this context, a regional competition policy that is designed as a part of a broader economic and social integration scheme should be functional in ensuring the fulfilment of the respective integration objectives. Then the following question that one needs to ask is to what extent a regional competition policy can be reasonably functional in the fulfilment of the objectives of a regional integration.

The deep RTAs examined above suggest that regional competition policy[206] is expected to be functional *for at least* three purposes: (i) effectively ensuring abolition of trade barriers between member states (in other words, avoiding the replacement of abolished trade barriers by private barriers to trade erected by anti-competitive conduct), (ii) promoting fair trade and a level playing field in regional free markets (so that market players will not be able to block one another's economic actions, and all market players

[205] (Qaqaya, 2013) cautiously notes that competition policy should not be seen as an answer to all economic and social challenges. Certain public needs can be better addressed under other policies. However, it is vital for countries to ensure coherence between competition and other public policies. According to him, for policy coherence developing countries should first '[set] *policy objectives and* [determine] *which ones are priority objectives, and whether there are incompatibilities between competition policy and other objectives.*' Then they should determine mechanisms for resolving potential inconsistencies and conflicts, and establish reliable systems for regularly monitoring policy enforcement. Such transparent systems, although politically difficult to establish, may partly reduce the legal uncertainties in the balancing of other public policies in competition law enforcement. Townley proposes a similar mechanism for public policy balancing in EU competition law enforcement. See (Townley, 2009), pp. 251-84.

[206] On the supplementary role of competition policy in deep RTAs, also see the discussion around fn. 23 in Chapter 3.

will have a *fair* opportunity to grow), and (iii) promoting the competitiveness of member states (which may be interpreted as improving efficiencies and providing support for industrial growth). The last objective in particular necessitates coherence of competition policy with other policy areas including investment, trade, intellectual property and industrial policies which aim at achieving economic efficiency and development in member states. These targets of competition policy, however, are not necessarily vocal about optimal goals of regional competition law enforcement.

Optimal goals of competition policy constitute an issue which has long been discussed in the literature but not yet resolved.[207] While some support a strictly economics-centred approach and submit that total or consumer welfare and economic efficiency should be the only goals of competition policy, others defend the benefits of consideration of certain non-economic public policy objectives in addition to total/consumer welfare and economic efficiency. With respect to developing countries, however, many competition experts recognise the benefits of the consideration of certain non-economic, development goals in competition law regimes.[208]

The discussion on optimal goals of competition policy in developing countries remains outside the scope of this thesis. In the context of a regional integration, however, it is believed that the conventional goals of competition policy (viz. consumer or total welfare and economic efficiency) as well as the other goals attributed to it (such as promoting economic development, reducing unemployment, certain re-distributional measures, etc.) need not be in conflict with the goals of regional integration. This is because the goals of competition policy and those of an RTA are almost always very broadly defined concepts whose realisation can be achieved by various political and economic arrangements. Broadly defined goals of competition policy and regional integration are often deliberately couched in general terms, precisely to leave enough room for future policy adjustment, and for the consideration of other public policy objectives during the implementation of the competition policy, if so desired. In light of

[207] For a review of the US and the EU perspectives, see (Martin, 2008).

[208] For instance, Section E Paragraphs 1 and 2 of the UN Set of Principles and Rules on Competition indicates promotion of '*economic development*' among the goals of competition policy. In practice many developing countries view economic development as among the goals of competition policy [(Qaqaya, 2013)]. Likewise, (Elenor M. Fox, 2011) refers to the special needs of developing countries and the unsuitability of the *Washington Consensus* for the respective countries. By contrast, (Gal, 2009b) supports an economic efficiency-centred approach for 'small economies'. See also Chapter 2, Section 2.3.1 above on the goals of competition policy in developing countries.

the above, one might conclude that member states of a deep RTA may have some flexibility in defining the goals of and enforcement priorities under a regional competition law regime subject to the condition that these are coherent with the grand objectives of the respective deep RTA.[209]

As discussed above, economic expectations play a key role in the functioning of RTAs. Abolition of (economic and non-economic) barriers to internal trade (i.e. internal market) under a deep RTA constitutes the basic mechanism that creates most of the common interests of member states. In line with this, the most prominent deeply integrated regional bloc in the world, the EU, gives special weight to the protection and promotion of regional integration between EU member states.[210] Accordingly, the integration of the '*single market*' is seen by the EU institutions as the overriding goal of the EU as well as the EU competition law regime.[211] In line with this, the objective of protecting and strengthening regional integration is given priority in the enforcement of all EU policies including competition.

Consideration of the 'market integration' or the 'single market' as the overriding goal of the regional competition policy is justifiable not only for the EU but all deep RTAs. This can be explained by the central importance of the integration of the markets across a regional bloc for the sustainability of the far-reaching economic and social cooperation between member states. In this regard, due to the key role of economics, disruptions to free trade in the internal market of a regional bloc may risk the very being of a regional integration, let alone regional competition law regime. Such risk may be greater at early stages of a regional integration, especially before member states start to accrue the full benefits of economic integration.

Moreover, as a regional competition law regime would take its legitimacy from the relevant deep RTA, the objectives of broader integration under the RTA would normally provide a framework for the enforcement and interpretation of all subsequent legislation adopted at the regional level.

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[209] Along these lines, Menns and Eversley suggest that the competition policy design in CARICOM should observe the goals and broad objectives of the Revised Treaty of Chaguaramas. The authors also emphasise that the CARICOM Competition Commission is '*afforded the opportunity to support more or less aggressively the fulfillment of CARICOM's industrial policy objectives.*'[(Menns & Eversley, 2011), pp. 12-15].

[210] On the strategic importance of the 'single market' for the EU, see (Monti, 2010).

[211] (Bailey & Whish, 2012), pp. 23-4 and 51.

From a practical point of view, pursuance of the internal market objective in regional competition law enforcement may (i) leverage the value given to regional competition policy by member state governments (as competition law would then become more influential in securing access of member states to one another's markets), and (ii) make competition policy a showcase for demonstrating the benefits of the regional integration, which might be beneficial both for regional integration and the application of regional competition law. The latter point concerns the direct influence of competition law regime on the economic activities of market players, and thereby on wealth of the consumers, and the economy in general.

Section 4.8 Conclusions

This chapter is dedicated to examination of the main motives of sovereign states in entering into an RTA, and the role of regional competition policy in the broader economic and political integration agenda of a regional bloc. For these purposes the chapter first offered a brief review of the historical development of RTAs, and three waves of regionalism between developing countries from the 1960s until today. In the following, economic and political motives of sovereign states in entering into regional integrations are examined.

Review of the factors that motivate sovereign states in entering into RTAs led to three main conclusions. Firstly, accruing gains, in particular economic gains, from regional integration is far from definite. Therefore member states must pay special attention not only to the terms of the integration agreement that they negotiate, but also the socio-economic and geo-political situation of their regional partners. In this respect sovereign states must carefully assess their current and prospective share in the global trade, the parties with whom they are entering into an RTA, terms of the integration agreement, and complementary economic and non-economic policies aimed at reducing intra-regional inequalities in the first place. Secondly, there are two primary goals of RTAs; these are to ensure economic development, and protect internal as well as external security/peace of member states. Thirdly, this study suggests that the economic development/gains objective lies at the heart of regional integration, because promotion of the peace objective is essentially based on the principle of establishing *economic* inter-dependency between member states. In this respect the success and sustainability

of regional integration is likely to develop in parallel with the success of its economic policies and the *fair* distribution of benefits deriving from regional integration between member states.

Subsequently, the chapter examined the role of regional competition policy in the context of a deep RTA. It concluded that competition policy is not of itself a goal of regional integration, but rather plays a complementary role of ensuring smooth operation of free markets within a regional bloc, and of supporting the other core objectives of regional integration. In the light of this, regional competition law enforcement needs to be in coherence with the broader integration objectives of an RTA. On the basis of the vital role of free trade in internal markets of a regional bloc and the dependency of a regional competition policy on the success of the RTA in which it is regulated, it is suggested that pursuance of the internal market objective in the application of regional competition law is desirable and beneficial.

Although regionally integrated competition law enforcement systems in deep RTAs might be helpful in improving competition law protection in developing countries, regional organisation of competition policy and law enforcement does have a number of disadvantages. Such disadvantages gain more significance when one considers the conditionality of the success of a regional integration on various economic, social, political and even geographical factors. The major disadvantages of competition law and policy enforcement at the regional level under a deep RTA will be examined in the next chapter by drawing on real experiences of developing countries under existing deep RTAs.

CHAPTER 5 THE INFLUENCE OF BROADER ECONOMIC (AND SOCIAL) INTEGRATION ON REGIONALLY INTEGRATED COMPETITION LAW ENFORCEMENT SYSTEMS

Introduction

This thesis concerns regionally integrated competition law enforcement systems in deep RTAs. Its primary objective is to understand the political and economic environment in which regional competition law enforcement takes place, and to evaluate whether regional enforcement can succeed in mitigating common competition law enforcement problems of developing countries. Thus the main focus of the thesis is on the nexus between regionally integrated competition law enforcement systems and the internal dynamics of economic (and social) integration processes under deep RTAs.

Chapter 2 examined the major problems of developing countries face concerning competition law and enforcement in three groups, namely, problems deriving from (i) socio-economic dynamics, (ii) political governance, and (iii) legal environment. It was demonstrated that a great number of the identified problems do not originate in the design of competition law and policy but result from the low level of development of the respective jurisdictions and, accordingly, from the limited availability of financial, technical and human resources.

Chapter 3 discussed '*regionally integrated competition law enforcement systems*', and explained how these differ from other regional/international competition agreements. The chapter outlined the different kinds of regional/international cooperation models in competition law enforcement, and then examined the potential costs and benefits of each model to participating jurisdictions (Chapter 3). It was suggested that regionally integrated competition law enforcement systems in deep RTAs is distinct from all other forms of regional/international cooperation agreements for at least three reasons: (i) they may lead to higher efficiency gains in legal enforcement, (ii) they contemplate the transfer of certain policy-making and adjudicative powers from the national to the regional level,[1] and (iii) they may include legally binding provisions concerning regional competition law enforcement. It was found that in some cases efficient and

[1] Yet different RTAs contemplate different levels of policy-making and legal enforcement authority transfers from national bodies to a regional centre.

deep inter-jurisdictional cooperation in competition law enforcement might also be achieved through soft law mechanisms. For intensive inter-jurisdictional cooperation based on soft law mechanisms, however, it is necessary for the parties to have a common understanding of the core competition concepts, similar substantive and procedural laws of competition, and mutual trust in each other's national enforcement standards and capacities.[2] This thesis argues that these conditions are unlikely to be fulfilled by developing countries since in most the rule of law is not yet fully observed, and competition law practice, in particular, is not advanced. In addition it was shown that, unlike all other regional *cooperation* agreements on competition policy, regionally integrated competition law enforcement systems may bring about additional gains (such as further reductions in the cost of enforcement, and increased ability to detect and punish international anti-competitive conduct) due to their link to a deep RTA establishing a '*common marke*t' or a deeper form of economic integration. In the light of the above, it was submitted that the benefits that might be obtained from a regionally integrated competition law enforcement system cannot be replicated in a stand-alone competition agreement, at least in the case of developing countries.[3] Accordingly, it was concluded that regionally integrated competition law enforcement systems in deep RTAs might be more effective than other regional competition agreements in strengthening competition law protection in developing countries. A core finding of the thesis was that the success of a regionally integrated competition law enforcement system must be considered conditional on the success of the relevant regional integration agreement. The enforceability of such regional competition law enforcement arrangements, however, strictly necessities the existence of a workable regional economic (and social) integration plan, as well as political backing from national governments of all member states.

On the basis that all existing regionally integrated competition law enforcement arrangements pursued by developing countries are established as an integral part of a regional economic integration agreement (i.e. a deep RTA), the nexus between deep economic (and social) integration and regionally integrated competition law

[2] See Chapter 3, Section 3.2.3 above.
[3] See Chapter 3, Section 3.3. Only a few *developed* countries are able to achieve similar benefits to that of a regionally integrated competition law enforcement system by using soft *cooperation* agreements. Developed countries might match the additional benefits of forming a 'common market' when, *inter alia,* they naturally develop strong mutual commercial ties, and when all parties have sufficiently similar and advanced national competition law enforcement practices.

enforcement systems deserves further examination. For this reason, Chapter 4 examined the primary economic and political motives that lead sovereign jurisdictions to enter into deep RTAs. In the light of these primary motives, the role given to regional competition policy in deep RTAs was evaluated. Review of the literature disclosed that sovereign countries enter into deep RTAs in order to accrue economic benefits from the efficiencies achieved through the formation of an *unrestricted* region-wide market, or the so-called '*common market*'. In addition, a noteworthy political motive, which is closely bound to regional economic performance under a deep RTA, is found to be the protection of (national and regional) security. Accordingly, economic interdependency created via strengthened commercial ties between member states of a regional bloc -*as well as between member states and the ROW*- is expected to protect the national security of member states, and regional security, by making any serious political dispute economically undesirable for all relevant jurisdictions. It was found that competition policy is not among the main objectives of a deep RTA. Rather, it is suggested that regional competition policy is given an important yet complementary role of ensuring that the *economic (and non-economic)* benefits expected from the abolition of intra-regional trade barriers will not be obstructed by anti-competitive action of (private or public) market players.[4] This finding provided further support for the core thesis of this research that the success of a regionally integrated competition law enforcement system in a deep RTA is necessarily conditional on the workability of the relevant broader regional economic (and social) integration.

Given the above findings, this chapter will illustrate the major limitations any regionally integrated competition law enforcement system faces due to its conditionality on the relevant broader economic (and social) integration arrangements. The literature often prefers to review regional integration from the perspective of a single discipline, and as a result the interactions between the law, politics and economics of regional integration remain largely undiscovered. Likewise, most legal studies on what this thesis calls 'regionally integrated competition enforcement systems' examine the subject within the boundaries of competition policy, and largely independent of the internal dynamics of regional integration. In offering a discussion of the influence of regional economic (and social) integration on regional competition law enforcement, this chapter aims to outline some of the intrinsic limitations of regionally integrated competition law enforcement

[4] See Chapter 4, Section 4.7.

systems. This chapter will discuss these major limitations under four headings. Accordingly it will examine the influence of (i) possible increases in regional inequalities as a result of a deep RTA (Section 5.1); (ii) persistent resource constraints and corruption (Section 5.2); (iii) preference for intergovernmentalism over supranationalism (Section 5.3), and (iv) the lack of implementation, the complementary role of competition policy in RTAs, and conflicting competition policy commitments under multiple RTAs (Section 5.4). During these assessments, the findings of the preceding chapters will be brought together. When examining the limitations of regionally integrated competition law enforcement systems, frequent reference will be made to the concepts and conclusions suggested in the preceding chapters, and their further examination will be conducted from a wider economic and political policy perspective.

As mentioned above, the core research question this thesis attempts to answer is whether a regionally integrated competition law enforcement system in a deep RTA can address competition law enforcement problems of developing countries. It is believed that analysis conducted in the present chapter will provide an understanding of the reasons for the poor performance of the existing regionally integrated competition law enforcement systems found under deep RTAs concluded between developing countries. A full answer to the core research question of this thesis, however, would require the examination of each regional bloc individually. Some relevant factors which may influence the success of a regionally integrated competition law enforcement system, and the factors which may deserve regional bloc specific examination will be discussed briefly in Section 5.5. Finally Section 5.6 will offer a brief summary of the Chapter's findings.

Section 5.1 Increased Regional Inequalities as a Result of Deep RTAs

Review of the economic and political motives of sovereign jurisdictions' entering into RTAs has shown that economic expectations lie at the heart of all RTAs. The protection of regional security objective, although often considered crucial by member states, is aimed to be achieved mainly by creating an economic interdependency of member states. In other words, it is believed regional peace ought to be protected mainly via

increased economic activity within a regional bloc.[5] Despite this key role of economic activity in the functioning of regional integration, analysis of economic dynamics of RTAs in Chapter 4 has shown that economic returns from RTAs cannot be considered definite. In the case of RTAs between developing countries in particular, there is a genuine risk of significant trade diversion, and transfer of wealth from poorer member states to their wealthier regional partners. As a result RTAs between developing countries may increase regional inequalities, and lead to *divergence* between the incomes of the member states.[6] Given the assessments of Chapter 4 above, the following paragraphs will first provide a brief overview on the way in which RTAs may increase regional inequalities, and then comment on some basic preconditions of mitigating regional inequalities in the long term. The negative influence of increased regional inequalities on regional competition law regimes will then be discussed.

A deep RTA between developing countries is likely to lead to higher trade diversion than a deep RTA between developed countries. This is because production of goods as well as provision of services in developing countries often cannot be made in efficient scales and with the use of the newest technologies. Trade diversion and wealth transfers from poorer member states to their wealthier regional partners will be higher the more the parties pursue protectionist policies such as employing high external tariffs or imposing legal barriers to avoid international competition.[7] At the same time, however, some degree of protectionism is considered by many to be necessary, especially for regional blocs consisting of developing countries, in order to support infant industries and to gain international competitiveness.[8] In addition, it is argued that protectionist measures may be essential to attracting net investment in the respective regions, and to triggering knowledge transfers. Although protectionism in such context is likely to

[5] (Nazzini, 2011) also recognises the central importance of economic gains for the European integration. He suggests that "[e]conomic *benefits of trade are a condition for the achievement of* [the EU's] *political and social objectives*". Ibid., p. 28.
[6] See, (Anthony J. Venables, 1999).
[7] See Chapter 4, Section 4.3.1 above.
[8] Among others, Singh supports the state's strong presence in economic planning in developing countries [(Singh, 1999, 2002)]. See also Chapter 4, Section 4.4. Fox argues that the US style free market economy (the so-called 'Washington Consensus') would not be suitable to securing the economic growth and development objectives of developing countries. At the same time the author warns that too much intervention and excessive discretion by officials would have severe costs as well [(Eleanor M Fox, 2007), p. 119-23]. Stiglitz explains that '…whenever information is imperfect and markets incomplete, which is to say always, and *especially in developing countries,* then the invisible hand works most imperfectly.' Significantly there are desirable government interventions which, in principle, can improve upon the efficiency of the market. These restrictions on the conditions under which markets result in efficiency are important – many of the key activities of government can be understood as responses to the resulting market failures [(Stiglitz, 2003), pp. 73-4].

strengthen agglomeration of economic activity in member states with higher 'comparative advantage' in the short term, at later stages of regional integration economic activity may gradually spread to the periphery, and to member states with lower 'comparative advantage'.[9] The diffusion of economic activity from the centre to the periphery has a significant impact on re-balancing regional inequalities in the long-term by peaceful means, and should therefore be considered a key objective for the political sustainability of regional integration. Direct wealth transfers within regional blocs are unlikely to redress regional inequalities with any long-term success. As mentioned in Chapter 4, there are at least two problems accompanying direct wealth transfers in the form of economic subsidies from advantaged to disadvantaged member states. Firstly, it is not possible accurately to calculate the amount of compensation, because not all benefits accrued to each member state from the regional integration are mathematically identifiable (e.g. long-term gains from technology diffusion). Secondly, direct wealth transfers inevitably produce political tension in both the compensating and compensated member states (e.g. the dissolution of the EAC in 1977; reoccurring disagreement on the terms of direct wealth redistribution between member states of ACU).

As review of economic motives for RTA in Chapter 4 demonstrated, there are pre-conditions of diffusion of economic activity from a regional centre to the periphery.[10] In this respect, strong transport links between the regional centre(s) and the periphery, or in other words between advantaged and disadvantaged member states, is critical. Likewise, availability of other basic physical infrastructure, such as reliable network services (viz. energy, transport, telecommunications, and finance) at the periphery is vital, because only if adequate physical infrastructure is in place will businesses be able to operate at the periphery, and to sell to and outside the relevant regional bloc. Complementary social policies are also indispensible for the spread of industrial activity from the centres to the periphery, in particular, in regional blocs formed by developing countries. Economic activity can be hosted at the periphery of a regional bloc only to the extent of the availability of human resources with required skills.[11] Likewise, transfer of technical knowledge to and emergence of local entrepreneurs in

[9] See the explanations on '*agglomeration*' at Section 4.3.1 of Chapter 4.
[10] Ibid.
[11] Although it is possible to arrange the relocation of skilled workers from outside, this might generate significant costs. Moreover, certain living standards might be required to persuade people with certain skills to relocate.

disadvantaged member states are dependent on the absorptive capacity of those states. The presence of skilled workers and the capacity to absorb and implement technical knowledge require a good education system, social security and overall quality of life in a given jurisdiction.[12] Legal harmonisation and free movement rights might become great facilitators of the diffusion of economic activities. Harmonisation of law, in particular on property rights protection, the finance industry, and investment, might be indispensable to securing the rights of investors, reducing compliance costs of expanding businesses beyond the *regional economic centre(s)*, and boosting the credibility of *the periphery* in the eyes of both regional and foreign investors. Free movement of goods, services, capital, establishment and workers, again, could be vital not only to the gradual diffusion of economic activity to the periphery, but also to mitigating the adverse economic implications of deep regional integration at the periphery from its early stages. Broadly speaking, while free movement of goods and services would help firms operating within a regional bloc to reach efficient production and service levels, free movement of capital and establishment would pave the way for the expansion or relocation of businesses from the regional economic centre(s) to the periphery. Free movement of workers, on the other hand, would offer employment opportunities to all people in a regional bloc (including the periphery) despite its being conditional on the possession of the required skills and an adequate physical condition for mobility. Although this conditionality will reduce the appeal of such employment opportunities in the most deprived parts of a regional bloc consisting of developing countries, eligible immigrant workers would typically spend a part of their income in their home countries or remit it to their families at their home state.[13] In the longer term, if the reforms necessary to ensuring a secure investment environment are made at the periphery, some immigrants may return to their home countries and use their newly

[12] A similar suggestion was made in connection with the development of the OECD Region (despite the absence of a formal deep integration agreement between the OECD members): '*Infrastructure is the foundation of regional development and has been the target of significant investment through regional policy in the past years. Regional competitiveness is affected by* ***infrastructure endowment****, such as transport and telecommunications networks which,* ***together with investment in human capital and innovation, can improve the access to markets, increase the connectivity of regions and provide services more efficiently****.*' (OECD, 2011), p. 126 (emphasis added).

[13] Remittances constitute one of the vital sources of money inflow in some developing countries. According to the World Bank's estimates, developing countries received above $410 billion in remittances in 2013. The World Bank estimates that in 2012 remittances accounted for 48 per cent of the total GDP of Tajikistan, and 31 per cent of the total GDP of the Kyrgyz Republic. See, (Ratha, Eigen-Zucchi, Plaza, Wyss, & Yi, 2013).

obtained skills and capital to invest there. In the latter case free movement of workers will be a functional of the diffusion of knowledge from the centre to the periphery.[14]

In light of the above it is fair to conclude that a deep RTA between developing countries is likely to produce disparities in benefits accruing to member states, and as a result, may increase regional inequalities. These could be mitigated either by direct wealth re-distribution or adoption of a set of structural reforms across the regional bloc.[15] As enforcement of direct wealth redistribution is often greatly constrained by economic and political problems, especially in the case of developing countries, investment in physical infrastructure, human capital, legal harmonisation and facilitating free movements becomes vital to the sustainability of regional integration. Taking regional action on these issues, however, frequently meets with resistance from national governments, because reforming the respective policy areas necessarily transfers some policy-making authority of the national government to a regional level. Given this sovereignty concern, despite the ambitious deep integration objectives in their founding agreements, many existing regional blocs formed by developing countries have experienced stagnation in regionalisation following the elimination of direct restrictions to intra-regional trade, such as taxes and custom duties. As a result, short-term inequalities that should ideally be addressed from the initial stages of a regional integration[16] carry the risk of increasing, and becoming long-term problems that jeopardise the sustainability of regional integration.[17]

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[14] The need to tailor wide-ranging regional policies in redressing regional inequality applies to all deep regional integrations, including those formed among industrialised nations. As suggested by an OECD study, from an historical context, '*regional policy has evolved and is evolving from a top-down, subsidy-based group of interventions designed to reduce regional disparities into a much broader 'family' of policies designed to improve regional competitiveness (...)*' (emphasis added). (OECD, 2005), p. 22.

[15] Due to different factor endowments of member states of a regional integration, however, total elimination of regional inequalities may not be possible.

[16] In the short term the political tension accompanying direct re-distribution of wealth could also be tolerated by member states when the necessary steps for reducing the long-term inequalities are taken.

[17] International community can have a significant role to play in promoting the access of developing countries to global markets and strengthening their local economies (both at the domestic and regional levels). (Winters, Lim, Hanmer, & Augustin, 2010) examine how international community can support economic development in low-income countries. The authors suggest that international community, and G20 countries in particular, can contribute to economic growth in developing countries by taking action in various broad policy areas. They identify three pillars to support economic growth in low income countries: (a) for mitigating downturns international support might focus on macroeconomic stability, building international capital and financial safety nets, and promoting agricultural investment and food security; (b) for raising underlying growth support can be directed at policies on international trade, investment in skills, infrastructure, financial sector development, and human development; and (c) as overarching targets international support aim at strengthening institutions and governance in low income countries, and ensuring provision of high quality advice and opportunities for knowledge exchange.

What are the implications of increased regional inequality following a deep RTA to regionally integrated competition law enforcement? As first shown in Chapter 3 above and re-confirmed in Chapter 4, success here depends on that of the relevant broader regional economic (and social) integration scheme. Regional competition policy is not among the core motives for sovereign jurisdictions' signing up to a deep RTA. As demonstrated in Chapter 4, in the context of a deep RTA, regional competition policy has a complementary role of ensuring the fulfilment of broader economic and social integration objectives of regional integration. Increased regional inequality as a result of a deep RTA would reduce the trust of disadvantaged member states in the entire integration scheme, and may diminish their will to comply with regional arrangements or to undertake the required reforms for furthering regionalisation. In the case of developing countries, in particular, any loss of already scarce resources to better-off regional partners might be even less tolerable than welfare transfers in deep RTAs between developed countries that are better able to afford short-term losses for long-term gains. From the perspective of advantaged member states, on the other hand, increased regional inequalities will translate into increased national wealth, and may therefore reduce the incentives of the respective national governments to agree on region-wide reforms intended to balance these inequalities. Although remedies against regional inequality would be to the benefit of all member states but only in the long term, political actors in advantaged member states may find it difficult to enlist the domestic electorate's support for such regional reforms as the electorate might appreciate investment in policies which would have a more direct effect on his/her daily life more. The institution of a complex regional competition law regime might become less desirable to national governments of developing countries.[18] This can be explained on at least three grounds. Firstly, despite the significant success of certain international platforms (such as the ICN and UNCTAD) in promoting competition policy in developing countries, awareness of the potential benefits of competition policy is still very low in some developing countries. Secondly, establishment of a regionally integrated competition law enforcement system, and harmonisation of laws and reorganisation of institutions, often require a lengthy and expensive process. In contrast

[18] Once a regionally integrated competition enforcement system is established, however, depending on the workload of competition authorities, the cost of competition regulation and enforcement could be partly defrayed by fees and sanctions imposed on private firms. Therefore, once the establishment process of a regionally integrated competition law enforcement system is completed, member states might like to keep the system running to reap the benefits of their investments in the regional competition law regime.

with the immediate costs of establishing a regionally integrated competition law enforcement system, benefits of such system would materialise only after the necessary legal and institutional arrangements are largely in place, when staff in competition authorities are given the necessary powers, and the same officials have developed the required skills and experience in enforcement. In other words, establishment of a regionally integrated competition law enforcement system requires strong political backing from the national governments of member states especially at the early stages of regional integration. However, when trust in the broader integration scheme becomes weak, such political backing is likely to disappear. Thirdly, some developing countries might consider the competition policy a legitimate tool with which governments of liberal economies can legally interfere in free markets. For example, when neighbouring developing countries with similar factor endowments are competing with each other in order to attract or retain foreign investment by offering sector-specific advantages, tax relief, etc., they may not wish region-wide competition legislation (and in particular, workable state aid regulations) to restrict their internal competition. Likewise, national governments may like to support their infant industries and national champions at the expense of short-term economic efficiency and consumer welfare in order to gain international competitiveness.[19] In such case, governments might find a stronger link between competition policy and national sovereignty, and may therefore show greater resistance to transferring some policy-making and/or legal enforcement power to regional bodies. Such resistance could be higher when national governments and/or influential business owners suspect the prospects of the broader regional integration scheme.[20]

In the light of the above, increased regional inequalities and more generally disbelief of member states in the long-term success of a regional integration could prevent the regionally integrated competition law enforcement system from being operational. This deterrent effect of increased inequality might be more pronounced at the early stages of regional integration (i.e. before member states experience the benefits of having a functioning regionally integrated competition law enforcement system).

[19] Similarly, it is suggested that the US and EU member states have an increased tendency to protect their national economies by lax competition law enforcement at times of financial crisis. It is argued that this tendency comes into play in the form of flexible enforcement of merger laws, and state aid regulation (especially in the EU). See, (Moura e Silva, 2013), pp. 127-31.

[20] By contrast, however, in certain cases regional competition policy may help national governments to implement some politically challenging policies. For instance, national governments may blame regional policies and use regional integration as a scapegoat when implementing unpopular policy reforms.

To ensure political backing from the national governments of member states, and to avoid increased regional inequality, it may be advisable to include clear regional development targets into deep RTAs, as well as the secondary laws and regulations adopted at the regional level. Such regional development targets should ideally present a detailed plan of the region-wide reforms that are required to redress regional inequality.[21] Parties should acknowledge that the short-term gains of advantaged member states are the direct result of the sacrifices of their disadvantaged partners. Accordingly, in return, the duty of the former group of member states should be to subsidise reforms and infrastructure projects that are aimed at balancing regional inequalities. Such reforms may initially appear to favour the disadvantaged only. However, the present enquiry suggests that *convergence* is vital to the sustainability of a regional bloc, which would help to strengthen both the economic and political power of *all* member states on the global scene. In this regard, measures to improve convergence need to be implemented largely, if not fully outside the regional competition law regime.

In sum, this section argued that convergence is essential to the sustainability of regional integration, and achieving it requires substantial investment in hard and soft infrastructure across the region. A major difficulty is that the cost of regionalisation is immediate, whereas most benefits can accrue only in the long-term. Establishment of regional competition regimes may be obstructed also by resource constraints and corruption that could not be prevented by deep regional integration. The next section will review this problem.

Section 5.2 Persistent Resource Constraints and Corruption

Examination in Chapter 2 of the major problems developing countries face in competition law enforcement has shown that the real sources of most of the identified problems are the low level of economic development and political corruption. In addressing these problems Chapter 3 suggested that regionally integrated competition law enforcement systems might be more effective than other forms of regional/international competition arrangement. In support of this claim, it was demonstrated that a regionally integrated competition law enforcement system in a deep

[21] These should ideally include: detailed budget estimates, individual commitments of all member states, remedies against noncompliance and dispute resolution mechanisms.

RTA might significantly reduce the cost of enforcement as a result of the establishment of a common market, and might allow closer cooperation between member states.[22]It was further suggested that the establishment of a regional competition authority under a regionally integrated competition law enforcement system might reduce the influence of national vested interest groups and big businesses over competition law enforcement. This would be the case when a regional competition authority is trusted to *supervise* the competition enforcement practices of the NCAs of member states, and/or is granted shared or exclusive *legal enforcement* authority. In either case political actors in member states as well as other vested interest groups might find it more difficult to influence the decision-making of the regional competition authority, as well as other negotiations that take place at the regional level.

Despite the above-mentioned potential of regionally integrated competition law enforcement systems, as noted in Section 5.1, the respective benefits would accrue only after significant investment is made and the primary institutional and legal reforms are completed. Likewise, with respect to economic returns from deep RTAs, economic welfare within a regional bloc might increase only gradually, as production becomes more efficient and the region starts to receive net investments. Accordingly, executing a deep RTA will not immediately lead to better competition practice, nor an instant money flow into the region.

As economic returns from regional integration can be achieved only gradually, at the early stages of regional integration developing countries may struggle to allocate the necessary resources for the establishment of a regionally integrated competition law enforcement system.[23] This might be even more of a problem when member states have pressing development needs and little trust in the broader regional integration scheme.

[22] In deep RTAs close regional cooperation on competition policy is often made subject to binding legal arrangements.

[23] UNCTAD refers to the lack of enforcement capacity, in terms both of staff and resources, as among the fundamental reasons why regional competition agreements between developing countries have not been implemented. Other reasons listed in the study are: lack of independent competition agencies; lack of clarity in the division of power between competition agencies and other government bodies; divergent and incompatible national laws; lack of mutual trust in legal systems and governance issues; lack of coherence and coordination between competition and other economic policies, marginal place of competition issues in integration agreements [see (UNCTAD, 2013e), p. 5]. Detailed examination of the influence of the above-mentioned factors, however, falls outside the scope of the study. Unlike the abovementioned UNCTAD study, this thesis explores the role of the regional competition policy in the context of the broader integration efforts under a deep RTA. Nevertheless, most of the factors identified in the abovementioned UNCTAD study are discussed in Chapter 3 of this thesis. The last point on the complementary role of competition policy in regional integration agreements will be elaborated in Section 5.4 below.

In this case international aid might be the only way of establishing a regionally integrated competition law enforcement system for developing countries. However, international aid could create adverse effects if it is not planned according to the local realities of recipient countries (e.g. the risk of losing the aid before it reaches the intended local recipient due to political corruption), and if the commitments of recipient states in return for the aid are not explicitly decided and observed.[24]

Consisting of a group of small and micro economies, the regional integration between the CARICOM member states provides a good example of the significance of the obstacles posed by economic restraints and political corruption to regional competition regimes.

The idea of regionalisation in the Caribbean Islands goes back to the colonial time of the late 1950s.[25] After several attempts at regional integration, thirteen countries from the region eventually established the Caribbean Community (CARICOM) with the ***Treaty of Chaguaramas*** signed in 1973.[26] With the purpose of deepening their regional integration, the CARICOM member states signed the ***Revised Treaty of Chaguaramas Establishing the Caribbean Community including the Single Market and Economy*** (the RTC) in 2001. The Revised Treaty came into force in 2006 together with an exemption for the Bahamas, which preferred to remain outside the CARICOM Single Market and Economy while preserving its membership of the CARICOM.[27] On the other hand, by August 2014 Haiti had not yet completed its full integration into the CARICOM Single Market and Economy, as it needs to make few more reforms in order to meet the minimal requirements of membership of the single market.[28]

At first sight CARICOM member states appear to provide a textbook example of ideal regional economic integration. They have small or micro economies, which mean that it

[24] (Collier, 2007); (Moyo, 2009).
[25] An early regional integration effort in the Caribbean region was the formation of the British West Indies Federation, in 1958, which came into an end in 1962.
[26] The following states were the full members of CARICOM in 1973: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago. Suriname and Haiti joined the CARICOM in 1995 and 2002, respectively. In addition, Anguilla, Bermuda, the British Virgin Islands, Cayman Islands, and Turks and Caicos Islands are associate members of the CARICOM. For more information, see, www.caricom.org (accessed on January 13, 2014).
[27] See, (CARICOM, 2013a). (Stewart, 2012) notes that the Bahamas' choice is 'understandable' due to the paucity of trade between the Bahamas and the other CARICOM member states. In addition, the author notes the concern about the envisaged free movement of workers policy and its possible negative effects on the Bahamas, as the Bahamas is said to have the highest wages within the regional bloc. See, ibid., p. 181.
[28] See, (CARICOM, 2014b).

is very hard for them to reach efficient production levels with domestic demand. The majority have a common colonial history – most were previously under the British reign. As a result they share legal and institutional traditions, and use English as their official language.[29] Such similarities can make regional cooperation easier, and might facilitate and accelerate regional law-and-policy-making procedures. Moreover, their geographical closeness, similar economic interests, and joint history doubtless fostered the creation of a common identity across the region. On the downside, however, the similarities in their factor endowments make these economies compete with one another, rather more than they strengthen specialisation and ensure better allocation of resources across the region. In addition, due to the very small economies, even the regional economic integration might not be sufficient to allow the necessary demand for efficient production levels, and for gaining international competitiveness. Nevertheless, small economies oblige the CARICOM member states to regional integration. On the other hand, it means that they have to search for ways to engage with the global markets in parallel with regionalisation. Besides, regionalisation in CARICOM might be especially functional in organising, financing and undertaking the necessary legal and infrastructural reforms across the region, and in this way promoting member states' closer integration into the global markets.

Economic restraints and political corruption have always been the main obstacles to CARICOM integration. Taimoon Stewart explains[30] the reasons for the struggle of the CARICOM member states in regionalisation mainly on four pillars: (i) first and foremost, their limited financial resources, (ii) due to the colonial history, the poor organisation of production in the respective economies,[31] (iii) bad governance, organised crime, and drug gangs which add to corruption and make legal enforcement difficult[32], and (iv) the clashes between ethnic groups, the internal caste system, and

[29] In this respect Suriname (a former Dutch colony), and Haiti (a former French colony) are the exceptions. In addition, some CARICOM member states might have influences deriving from previously being colonized by more than one imperial power (e.g. today's Guyana was first under Dutch control, and then became a British colony); see, (R. T. Smith, 1962).

[30] (Stewart, 2004a, 2012).

[31] (Stewart, 2012) reports that in the colonial period production in the respective countries was designed to meet the needs of the controlling imperial powers. As a result even today production mainly targets exports while domestic consumption is heavily dependent on imports. The author, however, does not examine the availability of domestic resources for reorganizing domestic production to produce goods for domestic consumption. See, pp. 162-9. See also, (Stewart, 2004a), pp. 43-53.

[32] (Stewart, 2012) notes that the CARICOM member states have become a major trans-shipment route to the USA for Colombian drugs; pp. 168-9. See also, (Stewart, 2004a), p. 50.

accordingly, discrimination in access to finance and other services.[33] In addition, Stewart emphasises that the extreme vulnerability of the region to natural disasters, the large informal sector, and the current incomplete legal and institutional reforms make regional cooperation even more difficult.[34]

The abovementioned problems of the Caribbean nations are mutually deteriorating. The growing drug-trafficking and security concerns across the region are well documented. As the Caribbean Islands are geographically placed between the major drug producers[35] and consumers[36], drug trafficking as well as consumption create formidable political and economic challenges for the region. In his insightful speech on drugs and crime in the Caribbean, Griffith suggests that drug trafficking should not be seen only as a military matter (i.e. a matter that requires delegation of police duties to the military), but considered from the nexus of geography, power and politics.[37] One of the two case studies examined by Griffith to demonstrate the multidimensional influence of drugs and drug trafficking is the 'Dudus Affair' that took place in Jamaica in 2009.[38] The case concerned the extradition of a drug baron called 'Dudus' to the US to stand trial for alleged distribution of guns and illegal drugs. Attempts to execute the extradition order met with local resistance and led to violent clashes between supporters of the drug baron (who received the support of the other drug barons in addition to that of people under his control) and security forces. The event led to the declaration of a state of emergency in the respective constituencies, and to the death of over 70 people.[39] In the following two years, participation of some parliamentary members in the process caused a governmental crisis, and resulted in reshuffles in prime minister Golding's cabinet, and eventually led to Golding's withdrawal from the next elections *inter alia* for losing the trust of the people.[40] The total monetary cost of this unrest is estimated to be around US$ 258.8 million, which represented about 2.1% of the 2009 GDP and 50% of tourism GDP in Jamaica.[41]

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[33](Stewart, 2012), pp. 163-4.
[34] Ibid., pp. 162-9, and (Stewart, 2004a), pp. 43-53.
[35] The Andean Region is reported to be the world's only source of coca and cocaine. Opium poppy, heroin and cannabis are also produced in the Latin America region. See, (Seelke, Wyler, Beittel, & Sullivan, 2011), pp. 1-3.
[36] The region's proximity to the U.S. makes it a natural route for drug trafficking; see, ibid.
[37] (Griffith, 2011), p. 4.
[38] Ibid, pp. 14-8.
[39] Ibid.
[40] Ibid.
[41] Ibid., p. 16.

As regional integration and abolition of internal barriers to intra-regional trade might only gradually and in the long term contribute to the solution of above-mentioned financial and social problems, the CARICOM member states needed to finance an important part of their regional integration process by raising aid from their international development partners.[42] Despite this foreign aid, not all member states were able to comply with the requirements of the Revised Treaty of Chaguaramas on their own account. One example is Article 170(2) of the RTC which obliges each member state to establish and maintain its own NCA. Due to their smaller size, member states of the Organisation of the Eastern Caribbean States (the OECS) decided to establish a single competition authority with exclusive legal enforcement power for this entire sub-region. It is expected that regional integration of the OECS member states will rationalise the provision of public services, help to eliminate duplication of the administrative structures, and will give the sub-region a better representation opportunity both on regional and international platforms.[43]

The OECS is a sub-group of the CARICOM bloc, which is formed by less-developed CARICOM member states in accordance with the ***Treaty of Basseterre*** in 1981.[44] In line with the core argument of this thesis, instead of cooperating in specific policy areas, such as the competition policy, on an independent basis, the OECS member states decided to enter into a separate, deeper regional integration agreement which would allow them to enjoy joint regional representation in the CARICOM, and an opportunity of joint legal enforcement in fulfilling the requirements of CARICOM legislation. This might be explained by the OECS member states' intention to cooperate closely in numerous policy areas, and the potential influence of such cooperation on national politics and economies of the member states. It is likely that entering into a deep RTA has provided member states of the OECS with a better ground to cooperate, to harmonise their laws, and to facilitate law enforcement at the regional level. Currently having seven member states and two associate members, in some policy areas the

[42] A recent press release from the CARICOM Secretariat reconfirmed that the CARICOM member states have a limited capacity to finance their self-development, and reemphasized the value of the international funding for the region. See, (CARICOM, 2013b).
[43] See (Schipke, Cebotari, & Thacker, 2013), pp. 4-5.
[44] For more information, see, www.oecs.org (accessed on January 13, 2014).

OECS has indeed achieved a deeper cooperation among its member states than has been evident under CARICOM integration.[45]

The OECS Economic Union is one of the four regional currency unions in the world, using the Eastern Caribbean Dollar, which is pegged to the US dollar (with a fixed exchange rate).[46] In 2010 the OECS member states signed the ***Revised Treaty of Basseterre***, which established the OECS Economic Union, and increased the level of harmonisation envisaged for the region's economic policies. Despite the treaties between the OECS member states requiring the formation of a customs union, this is yet to be accomplished.[47] In addition, hampered by the recent global financial crisis and the tourism-dependency of the respective economies, the OECS bloc still experiences significant financial constraints, which slow economic growth[48] and regionalisation.

As a part of this broader integration effort in the OECS, the competition enforcement authority of the OECS is expected to become operational by 2014.[49] So far the actual cooperation in competition law and policy between the CARICOM Competition Commission and the OECS has been limited to provision of technical assistance from the former to the latter.[50]

CARICOM and OECS experience shows that the formation of a deep RTA on paper cannot offer instant relief from economic constraints and the problems of good governance. To address these problems developing countries need to enforce various policy reforms, invest in infrastructure and improve the legal and financial investment environment. With an awareness of this aspect, the goals of regional competition law enforcement in CARICOM are interpreted to include strengthening the broader regional integration process in the regional bloc.[51] Undertaking a broad array of policy reforms, however, often requires full political support of all participating national governments, which is often not easy to obtain.

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[45] The current member states of the OECS are Antigua and Barbuda, Commonwealth of Dominica, Grenada, Montserrat, St Kitts and Nevis, St Lucia, and St Vincent and the Grenadines. Anguilla and British Virgin Islands are British Overseas Territories, and are associate members of the OECS (as well as the CARICOM). While Anguilla is a full member of the currency union and uses the Eastern Caribbean Dollar, the British Virgin Islands do not use the common currency.

[46] The other regional currency unions are the EU, the Central African Economic and Monetary Community, and the West African Economic and Monetary Union. See, (Schipke et al., 2013), pp. 3-4.

[47] Ibid., pp. 4-10.

[48] Ibid.

[49](Haraksingh, 2014).

[50] Ibid.

[51] See (Stewart, 2012), p. 177; (Beckford, 2010), p. 187 and; (Menns & Eversley, 2011), pp. 12-5. See also Section 4.7 above.

The following section examines the concerns about national sovereignty which might constitute another significant obstacle to regionalisation.

Section 5.3 Preference for Intergovernmentalism over Supranationalism

Successful coordination of any governmental action across member states of a regional bloc is always a challenging task since it requires balancing divergent national interests as well as those of the regional bloc as a whole. Furthermore, different legal, political and institutional traditions of member states often constitutes a formidable obstacle to the coordination of governmental action since, when such differences exist, regional institutions and decision-making processes must be reconciled with all different traditions.[52] Regional decision-making and cooperation will become more burdensome to member states the more their legal, political and institutional traditions are in conflict.

In addition to the difficulties deriving from the coordination of regional law and policy enforcement, RTAs can be found to pose a threat to the autonomy of the national governments of member states by their very subject. As in any other international agreement, in RTAs member states agree to limit their external autonomy for the purposes of the realisation of the objectives of regional integration. For instance, agreeing to eliminate certain trade barriers, allowing free movement of factors within regional borders, and leaving the supervision of certain trade moves to supranational institutions are all significant limitations to an independent state's power, which would traditionally be considered matters of national sovereignty.[53] Moreover, independent states cooperating as a regional group often seek to adopt certain rules and principles aimed at establishing order in regional negotiation, and providing sustainability of regional decision-making and law enforcement procedure. These common principles regulating regional cooperation can present another strand of limitations to the national sovereignty of member states.

The core question any country that is party to an RTA has to decide is the degree of sovereign power that it is willing to relinquish for the purposes of that RTA.[54] A critical dilemma is that on the one hand states act with self-interest (the main motive and first

[52] (Kassim, 2001), pp. 1-3.
[53] For a brief historical review of changes in the definition of 'sovereignty', see (Jennings, 2002); pp. 27-30.
[54] From the international law perspective this is a well-known struggle. See, ibid. pp. 33-8.

duty of all states is to maximise the security and wellbeing of their own citizens and to this end protect the political influence of their own national governments),[55] but on the other hand, today's increased inter-dependencies, economic and other, oblige states to find joint solutions for their common problems of existence. States agree to regional (or international) political arrangements for peaceful co-operation and co-existence.[56] Tailoring regional (or international) solutions to common problems of independent states, however, often involves a long process of acknowledgement of conflicting national interests, negotiation of conflicts, information asymmetries, compromise, and ultimately -*if successful*-, reconciliation.[57] Independent states act both as creators and enforcers of regional and international law and policy. Therefore, nation-states are the main determinants of the success of any regional arrangement. While some deep regional integrations create technocratic institutions for observing compliance of member states with their political commitments, because such regional arrangements take their legitimacy through the consent of national governments, the authority of a regional technocratic institution to oblige a member state to act against its will is limited.[58] This is a factor which may help to explain why today's regional blocs are largely governed by intergovernmental mechanisms and reconciliation. Besides, there is also the security aspect of deep RTAs. As explained in Chapter 3 above, elimination of certain trade restrictions lies at the heart of all RTAs. From a political perspective, it was noted above that economic interdependency created by a deep RTA carries political implications for the national security of member states. In this respect:

> '…trade can enhance or undermine the security of the state. The latter perspective leads to a desire to promote economic autarky in order to minimise dependence on foreign

[55] (Brus, 2002), pp. 1-5.
[56] Ibid.
[57] Liberal intergovernmentalism (LI) theory can give a realistic account of political dynamics of decision-making in regional integrations. The LI theory is based on two basic political assumptions. Firstly, it assumes that states are political actors and that *'states achieve their goals through intergovernmental negotiation and bargaining, rather than through a centralized authority making and enforcing political decisions.*' Secondly, the LI theory assumes that states are rational. Accordingly, states '*calculate the utility of alternative courses of action and choose the one that maximizes (or satisfies) their utility under the circumstances.*' In the context of the above two assumptions, LI theory explains the decision-making process in regional blocs in a three-stage framework: States first decide on their national preferences according to their geopolitical ideas and individual interests. Secondly, international bargaining takes place, which is shaped by information asymmetries and asymmetrical interdependence. Lastly, credible commitments of member states are decided, and/or regional institutions are created or adjusted for technocratic management. See, (Moravcsik & Schimmelfennig, 2009), pp. 67-73.
[58] This influence can be strengthened only when the regional institution is formed by direct representation of the people of the respective region. The limited representation of the people of Europe in the EU institutions is an important fact suggesting a democracy deficit in the EU; see, (Habermas, 2013).

> powers. This reinforces the point that whilst it is necessary to yield some sovereignty in order to maintain the international regime as a public good, there would always be tensions regarding how much sovereignty to yield and therefore a presumption in favour of intergovernmentalism.'[59]

The degree of mutual trust between member states, and the terms of their political and economic relationship are usually the key determinants of individual member states' approach to regional integration, and their preference between intergovernmentalism and supranationalism. When member states of a regional bloc have a long history of war and political dispute, then, in the absence of trust on the peace-promoting function of regionalisation, they might act too cautiously in adopting supranational policy measures, and more generally, in establishing strong commercial ties which might affect their economic independence. ASEAN is a commonly cited example of regional blocs in which the long history of war, ideological conflict and lack of trust between member states rendered stagnant the advancement of the regional integration.[60]

The examples of regional blocs in which the tension between intergovernmentalism and supranationalism is present can be multiplied, and found in all continents. For example, the need to re-adjust the division of power between the EU institutions and EU member states has been subject to continuous debate since the early days of European integration. The current political debate on the subject might lead the UK to a referendum on its EU membership in 2017. No doubt this can be read as a clear sign of substantial disagreement concerning the optimal division of power between the EU institutions and EU member states.[61]

As noted above, economic and political expectations of member states are decisive in the power national governments are willing to assign to supranational mechanisms. Getting the consent of national governments to significant power transfers under a deep RTA might not be a realistic expectation, at least until the supposed benefits of regional integration start to be enjoyed by member states. This suggests that, especially at the early stages of regional integration, inter-governmental cooperation might need to be developed on a voluntary basis with the consensus of all regional partners. For furtherance of a regional integration process, member states can be advised to be

[59] (Draper, 2010), p. 12. See also, (Kelly, 2005).
[60] (Lin, 2010), p. 821-2.
[61] The EU referendum bill of the UK can be accessed at: http://services.parliament.uk/bills/2013-14/europeanunionreferendum.html (accessed on March 3, 2014).

extremely clear on the objectives of the regional integration that they wish to establish, and to assess the feasibility of any action plan that all member states agree to follow.

In his work focussing on Africa in general, and Southern Africa in particular, Draper (2010) challenges the aptness of a EU-style regional integration for Africa.[62] Instead, he argues for very formal and limited economic cooperation between the African states. Such cooperation, he claims, should ideally be limited to trade facilitation and improvement of physical infrastructure, and regulated solely on an intergovernmental basis. [63] Draper objects that supranational institutions and substantial legal harmonisation in broad economic and non-economic policy areas would not ensure economic development and good governance in Africa. In order to justify his unorthodox claim, Draper relies on the literature on the internal dynamics of African states.[64] He argues that African states do not share a common political ideology upon which regional integration can be built. By this, he means common values, which would guide and inform the terms of regional cooperation; such as the high place afforded to democracy and fundamental human rights in the European integration. Informed by the literature, Draper notes that the lack of a common ideology would lead to conflicts between African states when they form a regional integration.[65] Secondly, he indicates that because of their unique history, many African states do not have strong governments that are capable of undertaking substantive policy reforms. In addition, he mentions the still very present problem of regulatory capture, cronyism and corruption.[66] Given these characteristics, Draper argues that the European experience, that an established deep RTA will preserve peace, is unlikely to hold true for African states. On the other hand, Draper rightly notes that the main trading partners of African states are developed economies. Due to low level of trade within Africa, Draper stresses the risk of trade diversion and agglomeration.[67] He therefore concludes that African states should rather aim to achieve better trade deals with the developed world and pursue only limited economic cooperation agreements with their neighbours in the continent.

[62] (Draper, 2010).
[63] Ibid. pp. 21-3.
[64] Ibid. pp. 12-4.
[65] Ibid.
[66] Ibid.
[67] Ibid, pp. 16-20.

Some concerns reported by Draper about the political dynamics in African states are hard to disagree with. In this respect the enforceability of an RTA will inevitably be affected if the national government of one (or more) member state(s) does not have the power of legal enforcement within its own territory. Problems of political governance and ideology, however, need to be addressed by all African states, no matter within or outside a regional integration. Draper seems to underrate the transformative power of international dialogue in promoting democratic values and human rights.[68] However, successful examples can be found in the European integration and the MERCOSUR, both of which require their member states to comply with a set of political conditions including embracing democracy. Nor are Draper's economic conclusions irreversible. While it is true that regional integrations are likely to bring higher economic returns when signed by states with a high volume of intra-regional trade, in any agreement trade diversion can be avoided by keeping external trade barriers low (in other words, by allowing imports from non-members). In addition, trade diversion and agglomeration would still be viable economic risks for the region under more restricted trade agreements negotiated on purely intergovernmental grounds. Lastly, Draper's recommendation to develop regional cooperation projects for improving physical infrastructure and encouraging good governance in a way resembles the emerging '*silent integration*' concept in Latin America.[69] When the necessary funding can be found for such a project, depending on its scope and terms, it may help vitalisation of intra-African trade, reduce the risk of agglomeration, and therefore provide important benefits to African states.

Finding a fine balance between intergovernmentalism and supranationalism is decisive for the success of all regional (and international) arrangements, and in this, regional competition law and policy enforcement is no exception. Different political, legal and institutional traditions may constitute a serious obstacle to the formation of a regional competition policy and law. Moreover, even when common ground for a regional competition policy is reached, different development goals member states might like to pursue in competition policy might translate into inconsistencies in legal practice. In addition, member states might have an explicit desire to protect their core industries

[68] Contrary to Draper, Gathii notes that '[t]*here is indeed evidence showing that there are gains in non-trade areas, such as security, arising from regional economic integration arrangements* ...[in Africa]' [(Gathii, 2010), p 597 (emphasis added)].
[69] See fn. 199 in Chapter 4 above.

and/or national champions from the discipline of competition. In this regard, too much tendency towards intergovernmentalism may risk the operation of regional competition authorities, where present. In the absence of a regional competition authority, on the other hand, such protectionist practices would be at greater risk of being unobserved.

CARICOM can again be cited as an example to demonstrate the potential restrictions to regional competition law enforcement caused by a strong tendency towards intergovernmentalism. As mentioned in earlier chapters, although the CARICOM member states have established a regional competition authority in order to ensure uniform implementation of regional competition policy across the CARICOM region, the enforcement power of this regional body (i.e. CARICOM Competition Commission) is significantly restricted. According to Articles 175 and 176 of the Revised Treaty of Chaguaramas, in investigation of alleged anti-competitive business conduct, the CARICOM Competition Commission is obliged to request the NCAs of the relevant CARICOM member states to investigate the alleged infringement at the preliminary stage. The Commission can initiate an own investigation only when it finds the outcome of the relevant NCA(s)'s investigation unsatisfactory. Even in the latter case, the RTC requires the Commission and the relevant NCAs to reach a consensus on the final outcome of such investigations, in the absence of which the case is referred to the CARICOM Council for Trade and Economic Development (COTED), which is a political institution formed by political agents of CARICOM member states, for final decision.[70] This dependency of the CARICOM Competition Commission on the NCAs of member states as well as on COTED not only opens the way for political influence, but may also risk spoliation of the evidence that would otherwise have been available. In addition, Articles 182 and 183 of the RTC authorise COTED to grant sector-wide or specific exceptions and exemptions from competition law enforcement when '*public interest'* so requires.[71] In this regard, political interference in the regional competition enforcement, if used extensively, might hinder the independence, and therefore the success of the CARICOM regional competition law regime.

[70] See Sections 3.2.2 and 3.3.2 in Chapter 3. COTED normally reaches a decision with a qualified majority, but issues which are 'of critical importance to the well-being of a Member State' require the affirmative vote of all CARICOM members. See, Article 29 of the RTC.

[71] (Beckford, 2010) confirms that CARICOM member states are allowed a degree of flexibility in pursuing regional as well as national development objectives in their application of competition law and policy. See also, (Menns & Eversley, 2011), pp. 12-5.

In light of the above, it may be concluded that the dynamics of the political and economic relationship between the member states of a deep regional integration will determine the opinion of member states on the optimum level of sovereign power that can be transferred to the supranational institutions for the purposes of the regional integration. In the absence of trust between regional partners, or in the regional integration process itself, independent states are more likely to prefer intergovernmental decision-making and enforcement. However, this may in return disrupt law and policy enforcement, in particular at the regional level. The effect of this vulnerability of regional enforcement holds not only competition policy, but also for the entire regional integration plan in general.

The next section will discuss the complementary role of competition policy in deep RTAs. The section will attempt to explain why states enter into multiple RTAs with conflicting competition policy provisions, and why regional competition policy arrangements are not always implemented.

Section 5.4 The Lack of Enforcement, the Complementary Role of Competition Policy in RTAs, and Conflicting Competition Policy Commitments under Multiple RTAs

A close look at the motives of the sovereign states in entering into deep RTAs in Chapter 4 above showed that economic development and promoting peace are the primary objectives of regional integration. Accordingly, it was concluded that in the context of deep RTAs competition policy plays only a complementary role of ensuring that the primary objectives of regional integration are not prevented by competition infringement by private or state enterprises.[72]

Due to this complementary role of competition policy in deep regional integration, the weight given to regional competition law and policy is likely to be dependent on at least three factors: (i) political commitment of the parties to implementation of the broader regional integration arrangements as well as the regional competition law, (ii) success of the broader regional integration, and (iii) coherence of the competition policy with the objectives of the broader regional integration. With respect to the last point, the extent to which the parties find competition policy relevant to the primary objectives of broader integration gains significance. The national competition law enforcement

[72] See Section 4.7 of Chapter 4 above.

practice of member states may inform the decision of respective national governments on the necessity of establishing a competition law and enforcement system at the regional level. With respect to the adaptation of the EU competition provisions in the Treaty of Rome, for instance, it is reported that both French and German delegations tried to transfer 'the important elements of their national economic systems' to the European Common Market structure.[73] It is suggested that the German negotiators who were then imbued by ordoliberal thinking in their national legislation sought a strict form of competition law, whereas the French negotiators viewed competition law more as an administrative matter.[74] The French tended to conceive competition law in political and policy terms, therefore preferring to base decisions on evaluation of the needs of the European Community and its Member States.[75] The remaining EU member states ranged between the German and French approaches.[76]

In practice it is possible for states to agree on competition policy commitments in deep RTAs without thoroughly assessing the separate arrangements that are required to fulfil those commitments. In many regional blocs formed by developing countries it can be observed that national governments are not always willing or able to undertake large-scale investments required to establish a regionally integrated competition law enforcement system.[77] In this context, the observation of Gathii (2010) about African RTAs is illustrative.[78]

According to Gathii:

> '…African RTAs are designed as flexible regimes. Flexibility here refers to the following defining features of African RTAs: First, these RTAs are regarded as establishing flexible regimes of cooperation as opposed to containing rules requiring scrupulous and rigorous adherence. Second, African RTAs incorporate as a central feature the principle of variable geometry, adopting steps for meeting timetabled and other commitments. Third, African RTAs adopt a broad array of social, economic and

[73] (Gerber, 2001), pp. 343-4.
[74] Ibid.
[75] Ibid., p. 346.
[76] Ibid., p. 344. On her examination of the *travaux préparatoires* (preparatory works) of the competition rules of the EU, Akman challenges the common view that Article 102 TFEU is a product of '*ordoliberalism'*. Rather the author suggests that increasing '*efficiency*' was the main intention of the drafters of the EU competition laws. [(Akman, 2009), pp. 267-303.]
[77] With respect to regionalization, many developing countries struggle with setting realistic objectives and time plans for *achievable* targets. In relation to this problem, it is hard to disagree with the President of the African Development Bank, Donald Kaberuka who stated that '[t]*he most dangerous thing is to confuse an action plan with action*.' See, (UNCTAD, 2013a), p. 60.
[78] (Gathii, 2010).

political objectives without giving salience to any set of objectives. Fourth, African RTAs demonstrate a particular preference for functionally specific objectives to undertake discrete projects and to serve as forums for the integrated development of common resources, such as river basins that cut across national boundaries. Fifth, African RTAs demonstrate a remarkable commitment to the equitable distribution of gains from trade and a corresponding weakness in the adoption of non-discrimination trade principles and the related objectives of trade liberalization. Sixth, African RTAs are characterized by multiple and overlapping memberships, exemplifying a classic case of the — "spaghetti bowl". [See, Jagdish Bhagwati, 'U.S. Trade Policy: The Infatuation with Free Trade Agreements' in *The Dangerous Drift to Preferential Trade Agreements*, Jagdish Bhagwati & Anne O. Krueger eds.,1995. A "spaghetti bowl" is a metaphor used to describe a system in which crisscrossing strands of bilateral trade agreements create a tangled mess of restrictions and regulations, ultimately disrupting rather than promoting free trade.] Multiple RTA membership illustrates the flexibility of open-door membership that African RTAs offer.'[79]

Gathii observes that African RTAs do not require strict adherence; and in line with the governing 'variable geometry principle', member states of an African RTA are allowed to opt-in to or out of certain regional policies, and to implement agreed regional policies at different speeds according to their national needs and preferences.[80]

The main purpose of the variable geometry principle is to facilitate regional cooperation between a group of countries with different development levels and/or different political priorities. Countries which might not be fully convinced that a given regional policy is in their domestic interests, or which might be unsure about the budget that they can allocate to implement a regional policy in the long-term, are allowed an extended time-schedule for implementation, or temporarily or permanently to opt out of that regional arrangement, subject to the consent of remaining member states. This flexibility in regional cooperation also ensures that a sub-group of member states, which are willing and ready to cooperate, can proceed with further integration. The variable geometry

[79] Ibid., p. 573.

[80] Ibid., p. 628-40, 609. The principle of variable geometry first appeared in the documents and treaties of the EU. Later on the term gained a widespread use in multiple platforms, in particular in the WTO negotiations. [(Lloyd, 2009), p. 52.] Scollay suggests that variable geometry may operate in two ways: '[It] *could involve a single agreement in which the members assume different ranges and levels of obligations, possibly on the basis of agreed criteria that might include levels of development. It could also involve overlapping agreements, where one agreement containing "core" provisions, to which all parties subscribe, coexists with separate agreements in which more advanced obligations are assumed by subsets of the members of the "core" agreement that are in a position to do so*' [(Scollay, 2007), pp. 128-9 (emphasis added)].

principle may facilitate regional integration among bigger groups of countries and speed regionalisation. Extensive use of the principle, however, may complicate the internal dynamics of regional blocs and make calculation of the effects of further regionalisation within a sub-group on the rest of the regional bloc harder. In addition, when combined with a lax attitude towards legal enforcement, such flexibility may increase legal uncertainties concerning the state of regionalisation in the respective regional blocs.

As Gathii demonstrates, the flexibility of African RTAs motivates African states to become members of multiple RTAs, because such membership provides them with free access to a bigger geographical market, and helps them to benefit from specific projects undertaken under different RTAs -such as those concerning use of a shared water source, or improvement of a physical infrastructure- simultaneously.[81] When a state has signed up to multiple RTAs and the terms of these agreements are in conflict with one another, Gathii notes that it may have the option to choose between the conflicting RTA provisions in accordance with its national interest in a particular situation.[82] Because disobedience to regional laws is not prosecuted in general[83], membership of multiple RTAs in the African context translates into widened trade options for sovereign states, with no necessary sanctions against noncompliance, or other political burdens. Yet, by being party to multiple RTAs, African states are required to observe the various interests under different regional arrangements instead of focussing on a single RTA. As a result, membership of multiple RTAs constitutes an obstacle to achieving deep regional integration.[84] Furthermore, Gathii recognises that African states do not intend to establish strong supranational institutions that can exercise authority over member states to ensure their compliance with regional laws and policy arrangements.[85] In essence, Gathii implies that regional integration efforts in Africa are mainly governed by inter-governmental decision-making. Despite the above concerns, however, Gathii is far from being pessimistic about the value of regional integrations in Africa. He emphasises, in particular, the importance of the improvements achieved by regional cooperation on specific infrastructural projects under African RTAs, and enhanced

[81] (Gathii, 2010), pp. 648-53.
[82] Ibid., in particular, pp. 650-1.
[83] Ibid., p. 641. Likewise, Hartzenberg notes that most regional integrations in Africa lack a sanctioning mechanism against noncompliance, and even when such mechanisms exist, monitoring of compliance is either weak or completely absent. See, (Hartzenberg, 2011), pp. 18-9. See also, (UNCTAD, 2013a), pp. 57-8.
[84] Ibid., pp. 664-5. For a similar conclusion, see, (Yang & Gupta, 2005), p. 15.
[85] (Gathii, 2010), pp. 574-5.

informal cooperation as a result of the links established through these regional integration arrangements.[86]

Gathii's observations on African RTAs provide an insight into possible reasons for the slow speed of regionalisation, as well as for the prominence of multiple RTA membership in Africa. Gathii's generalisation that African RTAs do not contain rules requiring rigid compliance and the establishment of strong supranational bureaucracies, however, may not be fully representative of all RTAs in the region. For example, as will be examined in more detail in the following paragraphs, strong supranational institutions and binding regional laws are, *at least on paper,* among the features of regional integration in the WAEMU. The same can be said of the COMESA.[87] Likewise, it is not clear whether specific projects under African RTAs on the use of common resources or the improvement of physical infrastructure need to be undertaken in the context of a broader regional integration setting. On the other hand, when the speed of regionalisation under the RTAs formed by developing countries is considered, a degree of stagnation in the implementation of the regional policies is ubiquitous. Besides, the extensive use of the variable geometry principle by developing countries inevitably makes the outcomes of the respective RTAs unpredictable and inefficient.

Similar concerns have been reported with respect to regional integrations in Latin America. Domínguez (2007) cites lax legal enforcement as one of the chief challenges to regionalisation in Latin America.[88] He criticises Latin American governments and the US for negotiating and signing regional agreements/protocols that they do not intend to ratify in the first place (as a result of which the agreements/protocols never gain legal effect). According to Domínguez, the reason for these political moves is to manage the relationship with other states in the Americas, and to be '*Inter-American team players*'.[89] Likewise, in an article specifically dealing with the legal character and force of the MERCOSUR laws, Vervaele (2005) demonstrates that in MERCOSUR the adoption of regional laws is heavily reliant on internal procedures and agenda of member states.[90] In this respect the two fundamental principles of the EU law,

[86] Ibid., pp. 584-7.
[87] In the COMESA the regional competition enforcement body started its operations only on January 14, 2013; and since then there have been significant amendments to the COMESA competition laws. See, http://www.comesacompetition.org (accessed on January 27, 2014).
[88] (Dominguez, 2007), pp. 94-7.
[89] Ibid.
[90] (Vervaele, 2005), pp. 392-4.

supremacy and direct effect, are not embraced; and there is no mechanism (that might be activated by member states, by MERCOSUR institutions, or by the citizens of member states) to force MERCOSUR member states to ratify and to duly incorporate the regional laws into their domestic law.[91] As a result, Varvaele reports, '[o]*nly 40 per cent of the always unanimous decisions have been effectively incorporated by all* [MERCOSUR member states] *and have therefore entered into force.*'[92] Presumably, the actual implementation rate of such unanimous decisions is even lower.

As noted above, the presence of a sustained and strong political commitment to broader regional economic (and political) integration, as well as to regional competition policy, is vital to the establishment of a regionally integrated competition law enforcement system. The factors that distract countries from focussing on a single deep RTA can constitute significant obstacles to the progress of deeper regional integration. This problem might be more significant in the case of developing countries as membership of multiple RTAs inevitably means higher administrative costs and the division of already limited resources among the various interests of multiple regional integration arrangements.

Concerning the political decision-making process behind regional competition law and policy Gerber (2012) differentiates between the formal regionalisation of competition law (in other words, establishment of a regional competition law regime), and the implementation of (formally recognised) regional competition laws.[93] The author points out the involvement of different political actors, officials and private interest holders, and different political motives in these two political dimensions.

> 'On the one hand, decisional influences relating to the political authority tend to support formal regionalisation. There are many incentives formally to regionalise competition law, and the costs of formal regionalisation tend to be limited. On the other hand, however, political factors provide far less support for implementation of competition law at the regional level. There the costs are higher and political benefits more limited. (…) Officials, politicians and other decision makers have conflicting incentives that are likely to lead them to talk about regionalisation as a positive step, but act in ways that are inconsistent with significant enforcement. [This can be referred to] as bi-level conduct – one form of discourse and action that is directed towards global and regional

[91] Ibid.
[92] Ibid., p. 394.
[93] (Gerber, 2012).

communities, but decisions about enforcement that focus on local needs and political relationships.'[94]

In his article Gerber examines the political influences on the establishment of a regional competition law regime, and on the enforcement of regional laws at three levels: national-level influences, regional-level influences, and extra-regional level influences. At these three levels, Gerber considers the following interest groups: states (in general), politicians, domestic institutions that are in charge of enforcing national competition law, domestic institutions that are in charge of other domestic policies but expected to have an interest in regional competition law enforcement (such as ministries of commerce and their interest in strengthening domestic market players), regional institutions that are in charge of enforcing regional competition law, regional institutions that are in charge of other regional policies but expected to have an interest in regional competition law enforcement (such as political institutions of regional blocs which are authorised to decide on the budget or enforcement priorities of the regional competition enforcement bodies), private businesses, domestic professional groups, and international organisations working on trade and competition policy matters. Gerber concludes that signing RTAs with competition provisions can be more desirable for developing countries than implementing these agreements. This might be explained by the relatively low cost of negotiating such RTAs. In addition, as Gerber points out, international and domestic interest groups might be more interested in getting such agreements signed than ensuring that they are implemented.[95] When it comes to the implantation of regional competition law, however, national-interest focussed polities of member states are likely to create more concrete problems that are capable of obstructing legal enforcement. Such problems may concern, in particular, the division of competences between regional and national levels, and determination of competition enforcement priorities ('*who is enforcing, with which budget, against whom, for whose benefit?*').[96] The author suggests that these various political dynamics need to be

[94] Ibid,, p. 271.
[95] From the perspective of external influences over regional competition law enforcement, Gerber indicates that international organisations, such as the UNCTAD and the ICN, often pay significantly more attention to the enactment of a competition law than its enforcement. Therefore extra-regional influence over regional competition law enforcement level is found to be relatively insignificant. See, ibid, p. 269.
[96] Ibid, pp. 258-72. One objective of Gerber's article is to outline some conceptual tools for examining political decision-making processes relevant to regional competition law systems. For this purpose, as noted above, Gerber differentiates between influences on the formal regionalization of competition law, and influences on the implementation of regional competition law. Notably, in relation to the former category, influences on formal regionalization of competition law, Gerber lists the factors that can be

unearthed and negotiated in each regional bloc, and adequate legal solutions tailored. In addition Gerber duly notes that regional integration is a '*process - a set of interactions over time among an identifiable set of participants*' rather than a single political incidence.[97] As the dynamics of the political relationship between the abovementioned influence groups changes over time and with the influence of national, regional, and international politics, regional competition law arrangements may develop slowly within the process of regionalisation.[98]

Besides the enforcement problems deriving from the difficulty of cooperation between independent states at the regional level, as mentioned previously, conflicting commitments of developing countries under multiple RTAs often constitute a further obstacle to deep regional integration, and therefore to the establishment of a workable regional competition law enforcement system.

Membership of multiple deep RTAs is common among developing countries and, in particular, African states. By 2013, out of 53 only 3 African states (i.e. Algeria, Cape Verde and Mozambique) were affiliated to only one African economic community.[99] Of the remaining 50 African states, most have overlapping membership of three or more regional groupings.[100] Although the majority of African RTAs envisage limited or no regional cooperation on competition policy, few deep RTAs, including the COMESA and the WAEMU, require their member states to establish fully fledged regionally integrated competition law enforcement systems with supranational institutions that are trusted with law enforcement authority.

Some major problems of regionally integrated competition law enforcement, and the way these problems might become even more complex in a multiple RTAs setting will be explained below by drawing on regional competition law enforcement in the WAEMU, and its anticipated integration into the greater regional competition law

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summarized as benefits and costs of regional competition law systems from the perspective of individual states (covered under 'process factors and product factors' titles under national-level influences). The author notes that these factors are taken into account by '*political decision makers*'. With respect to the second category, the enforcement of regional competition laws, on the other hand, Gerber considers the interests and influences of specific institutions at national and regional levels. In practice, however, at least some benefits and costs considered in the former category are likely to be taken into account by the specific institutions examined under the second category. In addition, it is believed that a full review of political dynamics of regionalization of competition law would require assessment of the *individual interests and influences* of the actual 'political decision makers' in this first category as well.

[97] Ibid., p. 255.

[98] Ibid., p. 270.

[99] For a full table of regional economic communities in Africa, see (UNCTAD, 2013a), pp. 9-10.

[100] Ibid.

enforcement arrangement under the ECOWAS – all WAEMU member states have an overlapping membership of the ECOWAS but *not* all ECOWAS member states are also members of the WAEMU. It is important to note, however, that each regional bloc has its unique set of political and economic dynamics, and in line with these, unique legal problems. Furthermore, it appears that the internal dynamics of regional blocs show dramatic disparities across different continents. The review below of regional competition enforcement in the WAEMU and ECOWAS is intended to give an impression of the types of problem that developing countries may face, rather than reach generally applicable conclusions for all regional blocs formed by developing countries.

The West African Economic and Monetary Union (WAEMU, a.k.a. UEOMA - Union Économique et Monétaire Ouest-Africaine) is formed of eight countries from West Africa, namely, Bénin, Burkina-Faso, Ivory Coast, Mali, Niger, Sénégal and Togo, in 1994. Guinée Bissau joined the union in 1997. The purpose of the regional integration in WAEMU is to promote economic integration among the countries that share a common currency [i.e. the CFA (Colonies Francaises d'Afrique) franc], common language,[101] and common legal traditions.[102] According to Article 4 of the ***Treaty on the West African Economic and Monetary Union*** (the WAEMU Treaty)[103], the ultimate objective is to establish a common market with free movement of goods, services, capital, and persons, and the freedom of establishment. The WAEMU Commission is the executive authority of the Union, which is located in Ouagadougou, Burkina-Faso, and is financed by a one percent levy on all imports by WAEMU.[104] The Commission's executive powers include the authority to refer cases to the WAEMU Court of Justice, or to propose legislative initiatives to the political bodies of the Union – the Council of Ministers and the Conference of Heads of State.[105] Article 6 of the WAEMU Treaty rules that WAEMU law has supremacy and direct effect over the national laws of WAEMU member states.[106]

[101] The official language of all WAEMU member states except Guinée Bissau is French. The official language in Guinée Bissau is Portuguese.
[102] (Bakhoum, 2006), p. 654.
[103] Signed in Dakar on January 10, 1994.
[104] (Meyer, Fenyes, Breitenbach, & Idsardi, 2010), p. 31.
[105] (Weick, 2010), pp. 526-7.
[106] Ibid.

Articles 88-90 of the WAEMU Treaty set out the primary competition legislation of the Union, which prohibits unilateral restriction to competition, abuse of dominance and state aid.[107] Although in the early days of WAEMU integration there was ambiguity in the allocation of competences between the regional institutions and the NCAs of WAEMU member states, in 2000 the opinion no. 003/2000/CJ/UEMOA of the WAEMU Court of Justice clarified the law, ruling that the WAEMU Commission has exclusive authority to decide all matters of competition law within the Union.[108] Accordingly, unlike the shared competence (between national and regional institutions) principle embraced by the EU competition regime, the Court ruled that the WAEMU Commission would decide all competition cases regardless of the presence of any cross-border element, or any effect on trade between member states. Consequently the court's ruling significantly reduced the competence of the NCAs of WAEMU member states (yet the NCAs, when present, were and still are obliged to assist the WAEMU Commission)[109], and restricted the legislation and enforcement authority of member states to areas remaining outside WAEMU jurisdiction, such as the criminal aspect of the competition infringement.[110]

Although centralization of competition law enforcement under a regional institution can prevent inconsistent implementation of regional law by the national institutions of member states, and can thereby contribute to legal certainty, in the case of WAEMU, regional competition law enforcement so far could not succeed in effectively dealing with all competition issues in the region. The reasons suggested for the poor performance of WAEMU competition regime are multiple. Firstly, the WAEMU member states, and in particular Senegal, which adopted its national competition law as early as 1994, challenged the Court of Justice's interpretation of the WAEMU Treaty on division of competence on competition law enforcement between national and regional institutions. It is suggested that this might have triggered unwillingness on the part of the member states to submit purely national cases for review by the WAEMU Commission, and thereby restricted the number of cases brought for competition law

[107] ibid. WEAMU law does not include a specific procedure for merger control. Parties, however, are allowed to request negative clearance from the WAEMU Commission. See (Matthieu, 2011), p. 2.
[108] See (WAEMU, 2004), p. 5. On the abovementioned opinion of the WAEMU Court of Justice, see also, (Weick, 2010), pp. 531-3; and (Bakhoum, 2006), pp. 662-3.
[109] The obligations of the NCAs in this respect can be found in the WAEMU Directive No. 02/2002/UEMOA. See, (Bakhoum & Molestina, 2012), p. 92.
[110] (Weick, 2010), pp. 531-3.

adjudication at the regional level.[111] Secondly, a general criticism of the centralized enforcement is that it creates a distance between the victims of anticompetitive behaviour in member states and the regional institutions that are charged with deciding competition law cases.[112] As the centralized system in WAEMU does not require the authorization of a local institution (such as NCAs) in all member states to help in investigating or receiving direct complaints,[113] the system is likely to make filing of competition complaints more challenging for most (real and legal) persons, and make the raising of competition awareness more difficult, especially at the peripheries of the region. Authorization of local institutions, on the other hand, would mean higher costs, which might not be affordable in the case of regional blocs formed by less developed countries (e.g. OECS). Thirdly, there have been problems in allocating the necessary resources to the WAEMU Commission. Due to human, and more importantly, financial resource constraints, the WAEMU Commission can only initiate and determine a limited number of investigations.[114] In other words the current enforcement capacity of the WAEMU Commission has proved to be insufficient to reviewing all complaints of competition law infringement across the WAEMU region. Lastly, although WAEMU law do not seem to oblige member states to adopt domestic competition law and to establish NCAs, the extensive supportive function foreseen for already existing NCAs under Directive No. 02/2002/UEMOA, combined with the resource constraints of the WAEMU Commission, give the impression that effective competition law enforcement could only be achieved by ensuring cooperation between national institutions of WAEMU member states and the WAEMU Commission. However, not all WAEMU member states have an NCA, and those that have domestic competition law are yet to incorporate the regional competition rules into their national systems.[115]

Competition law administration, adjudication and enforcement experience of the WAEMU demonstrates the various challenges of establishing a workable regional

[111] (WAEMU, 2004), p. 65; (Bakhoum, 2006), p. 675-6. Bakhoum and Molestine report that the NCAs of the WAEMU member states refuse to fulfil their obligation to assist the WAEMU Commission by monitoring their national markets, assisting investigations, etc. In the more extreme case of Senegal, cooperation between the WAEMU Commission and Senegal's NCA is said to be completely absent [(Bakhoum & Molestina, 2012), p. 99].
[112] (WAEMU, 2004), p. 65; (Bakhoum, 2006), p. 675-6.
[113] (Bakhoum, 2006), p. 664.
[114] (Diallo, 2014). Bakhoum and Molestina indicate that the Competition Commission has sufficient financial means; however, the Competition Directorate in the Commission lacks the necessary flexibility to use these resources [(Bakhoum & Molestina, 2012), pp. 93-95].
[115] (Bakhoum & Molestina, 2012), p. 97.

competition regime, especially when resources are tight. In the specific case of the WAEMU, institutional structure (and in line with this, the division of competences between regional and the national levels), resource constraints, and delay in the incorporation of regional competition law into the domestic law of member states seem to create the biggest problems for the regional competition law regime. In order to address these problems the WAEMU Commission is currently working on a substantial reform plan which also aims at restructuring the current institutional design of the competition authorities and the division of competences between national and regional institutions.[116]

As mentioned earlier, a development parallel with the efforts towards reforming the competition law regime in the WAEMU is the establishment of a regional competition law regime in the ECOWAS – the Economic Community of the West African States. As all WAEMU member states have overlapping membership of the ECOWAS,[117] the latter's competition law regime will also be applicable to the WAEMU. In accordance with this, the WAEMU Treaty recalls the objectives of the ECOWAS integration in its Preamble.[118]

ECOWAS is a regional bloc formed by fifteen West African states[119] in 1975 with the objective of promoting regional integration '*in all fields of economic activity, particularly, industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions,* [as well as] *social and cultural matters.*'[120] As does the WAEMU Treaty, Article 3 of the ***Revised Treaty Establishing the Economic Community of West African States*** (the 'Revised ECOWAS Treaty')[121] provides that economic integration objectives of the union include the formation of a common market in which goods, services, capital and persons have free movement, and real and legal persons have the right of establishment.

[116] Ibid., p. 111.
[117] However, not all ECOWAS member states are also member states of the WAEMU.
[118] (WAEMU, 2004), p. 4.
[119] Member states of ECOWAS show greater diversity in terms of their colonial histories, legal systems and official languages than do WAEMU member states. Of the current member states of ECOWAS, Benin, Burkina Faso, Côte d'Ivoire, Guinea, Mali, Niger, Senegal, and Togo are Francophone; Ghana, Gambia, Liberia, Nigeria, and Sierra Leone are Anglophone; and Cape Verde, and Guinea Bissau are Portuguese-speaking countries. All three languages used by the ECOWAS member states are the official languages of the union.
[120] See, http://www.comm.ecowas.int/sec/index.php?id=about_a&lang=en (accessed on January 24, 2014).
[121] The original treaty was signed in Lagos on May 28, 1975, and then revised at the Cotonou Summit of Heads of States on July 24, 1993.

Currently the regional bloc is in the process of establishing a customs union[122], and presumably the purpose of forming a full economic union can be met, if successful, in no near future. According to the above-mentioned provision of the Revised ECOWAS Treaty, and similarly to the EU, the goals of the ECOWAS include broader social policies, such as raising the living standards of its people, harmonization and coordination of policies for the promotion of culture, education, health, legal matters, etc. The executive body of ECOWAS is the ECOWAS Commission, established in the year the union was founded[123], and sits in Abuja, Nigeria. Regional institutions of the union include the Authority of Heads of State and Government, the Council of Ministers, the Community Parliament, the Economic and Social Council, the Community Court of Justice, and the ECOWAS Bank for Investment and Development.[124]

There appears to be uncertainty about the direct effect and supremacy of ECOWAS law. Mathis and Dawar (2008) suggested that it has 'superiority' over the national laws of ECOWAS member states, and that superiority will in effect oblige the courts and agencies of member states to apply this regional law when they deal with a claim based on this regional law.[125] The authors cite the Revised ECOWAS Treaty as establishing the superiority or priority of this corpus of law, but without indicating a specific provision. Yet neither the Revised ECOWAS Treaty nor the secondary law includes any explicit provision on the applicability of the supremacy and direct effect principles in the ECOWAS context.[126]

While Oppong (2011) acknowledges the absence of any explicit recognition of the above-mentioned principles in the ECOWAS legislation,[127] he indicates that two decisions of the ECOWAS Court of Justice might be interpreted as confirming the supremacy of ECOWAS law. The author cites *Frank Ukor v. Alinnor*[128] in which the court ruled that the ECOWAS Treaty is '*the supreme law of the ECOWAS, and it may*

[122] ECOWAS member states plan to implement common external tariffs from January 1, 2015. See (ECOWAS, 2013).
[123] Initially, it was named the ECOWAS Executive Secretariat, and in 2006 the name was changed to the ECOWAS Commission. See, http://www.comm.ecowas.int (accessed on January 24, 2014).
[124] Article 6 of the Treaty of ECOWAS.
[125] Ibid.
[126] In addition, it is at least dubious to assume that supremacy alone would automatically *oblige* the parties to embrace direct effect of the regional law.
[127] The author also notes that this is not a problem specific to the ECOWAS, and that the founding treaties of the COMESA, the EAC and the SADC are also silent about direct effect. (Oppong, 2011), p. 195.
[128] ECW/CCJ/APP/01/04, ECOWAS Court of Justice, 2005.

be called its Constitution.'[129] Secondly, the author refers to *Jerry Ugokwe v Nigeria*[130] in which the court held that '*the distinctive feature of the community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in community law.*'[131] These judgments, however, do not exclude the need to give legal effect to regional law by recognizing this in the domestic legal systems of member states.

A more detailed review of the legal effect of ECOWAS law can be found in Nwauche (2011), which suggests that the direct effect of the regional law is ultimately dependent on the domestic law of each member state.[132] The author cites Article 5(2) of the ECOWAS Treaty, which requires member states to make the required legal arrangements in accordance with their national constitutions in order to give effect to the provisions of the ECOWAS Treaty. The author notes that this requirement should also apply to the secondary laws of the region, and therefore the direct effect of ECOWAS law should be dependent on the constitutional principles applicable in each member state.[133] Accordingly, Nwauche differentiates between member states that embrace monism in their constitutions (i.e. French-speaking and Portuguese-speaking member states) and those that embrace dualism in their constitutions (i.e. English-speaking member states). The author indicates that while dualist countries require international law (including ECOWAS law) to be promulgated in national legislation before gaining legal effect in their national courts, in monist countries, international law (including ECOWAS law) automatically becomes part of the domestic legal system upon their ratification, subject to reciprocal enforcement of the respective law by other parties.[134] Similar to Article 55 of the French Constitution, in these monist states, international treaties or agreements that are duly ratified and approved shall, upon their publication, have authority superior to that of domestic legislation, subject to reciprocal implementation by other parties.[135] Nwauche, however, notes that in practice ECOWAS law seems to lack direct applicability even in the monist states, due to the principle of reciprocal application. In addition, the author indicates that in some cases delay might occur in ratification of regional law when regional law conflicts with the national

[129](Oppong, 2011), p. 97.
[130] ECW/CCJ/APP/02/05, ECOWAS Court of Justice, 2005.
[131] (Oppong, 2011), p. 97.
[132] (Nwauche, 2011).
[133] Ibid., pp. 186-9.
[134] Ibid. See also, (Oppong, 2008).
[135] (Oppong, 2008), pp. 10-1. English translation of Article 55 of the French Constitution is available at: http://www.assemblee-nationale.fr/english/#VI (accessed on March 3, 2014).

constitution.[136] As a result, he concludes, ECOWAS law, '*perhaps with few exceptions'*, does not have direct effect and direct applicability.[137]

Despite the above uncertainties about the legal effect of ECOWAS law and the slowness of the regionalization, ECOWAS member states intend to deepen their regional cooperation, and to establish a regionally integrated competition law enforcement system.[138] For these purposes the ECOWAS Commission in cooperation with the WAEMU Commission prepared a framework on ECOWAS competition policy in 2007.[139] In addition, in December 2008, the ECOWAS member states adopted the ECOWAS competition laws (i.e. the Supplementary Act No. A/SA.1/06/08), and agreed on the laws establishing the 'Regional Competition Authority for ECOWAS', and regulating the terms of its operation (through the Supplementary Act No. A/SA.2/06/08).[140] ECOWAS competition regime aims to deal with four major types of anticompetitive action: unilateral restrictions to competition, abuse of dominance, mergers and acquisitions, and state aid.[141] The jurisdiction of the ECOWAS competition authority is limited to anticompetitive agreements and practices that affect trade between the ECOWAS member states.[142] Unlike the WAEMU laws, ECOWAS competition laws anticipate shared competence of the regional competition authority and the NCAs of ECOWAS member states in competition law enforcement.[143] In

[136] In Senegal as well as in Benin a regional law which conflicts with the constitution can only be ratified after the relevant provisions of the constitution are amended. See (Nwauche, 2011), p. 188.
[137] Ibid., p. 186-9. Curiously, Article 9(4) of the Revised ECOWAS Treaty provides that the decisions of the supreme political body of the ECOWAS, the Authority of Heads of State and Government, shall be binding on ECOWAS member states and regional institutions. Accordingly, unlike provisions of the Revised ECOWAS Treaty, the decisions of the Authority of Heads of State and Government might be considered to have direct effect. Ibid., pp. 190-3. Oppong disagrees with this interpretation. After indicating the existence of almost identical rules in the EAC and the COMESA laws, the author notes that '*it can hardly be argued that these provisions were meant to enshrine the principle of direct applicability*' [(Oppong, 2008), pp. 5-6].
[138] The Revised ECOWAS Treaty does not make a specific reference to the competition policy. On the ground of broadly defined objectives of the regional integration, however, competition policy is considered within the scope of regional integration. Dr Seydou Sacko of ECOWAS Commission suggests that the primary legal grounds for regional competition law and enforcement in ECOWAS are Articles 50 and 60 of the Revised ECOWAS Treaty. See, (Seydou, 2010).
[139] (Ngom, 2012), p. 117.
[140] These two acts and the 2007 ECOWAS regional competition policy framework can be found at http://www.comm.ecowas.int/dept/stand.php?id=i_i1_act_add&lang=en (accessed on January 27, 2014).
[141] Article 5, 6, 7 and 8 of the Supplementary Act No. A/SA.1/06/08, respectively. In addition, Article 9 of the same act prohibits anticompetitive public practices.
[142] Ibid.
[143] Article 13 of the Supplementary Act No. A/SA.1/06/08.

addition, appeal against decisions of the ECOWAS competition authority lies to the ECOWAS Court of Justice, and the decisions of the latter shall be final.[144]

Although it has been over five years since the adoption of the abovementioned two laws, ECOWAS competition rules are not yet enforceable, and the ECOWAS competition authority is not yet active. This stagnation might be explained by the complexity of the regional cooperation between the ECOWAS countries, which have a diverse palette of political identities, legal traditions and economic interests. With respect to competition policy, however, the first and most obvious problem of the ECOWAS is ensuring coherent enforcement of the regional competition law by member states. The coexistence of the competition enforcement systems of the WAEMU and ECOWAS may bring about a number of difficulties. Mathis and Dawar (2011) suggest that the '*for competition law, the WAEMU has all the characteristics of a single national territory, with its own high court providing superior application of the regional law in respect of its own members and applicable across the entire WAEMU regional territory. (...)* [Therefore,] *the WAEMU should be treated as a single state (customs territory) entity in respect of a created ECOWAS regional law.*'[145] Likewise, Ngom (2012) indicates that the drafters of the ECOWAS competition law proposed considering the WAEMU region as a single state for purposes of competition law enforcement at the ECOWAS level.[146] Arguably, one might be able to find traces of this approach in the regional competition law of the ECOWAS.[147] Considering the internal organizational and legal enforcement problems of the WAEMU, however, persuading all WAEMU member states to be represented by a single unit run by the WAEMU Competition Commission might not be easily achievable. Current competition enforcement practice in the WAEMU, although very limited, is far from being homogeneous as would be expected from legal enforcement of a single national territory. Even when this formidable hurdle is overcome, there need to be clear legal arrangements in place to give citizens of WAEMU member states the right of direct representation before the ECOWAS Commission and the ECOWAS Court of Justice in competition matters. An additional legal problem might arise when the ECOWAS

[144] Article 7 of the Supplementary Act No. A/SA.2/06/08.
[145] (Mathis & Dawar, 2008), p. 394 (emphasis added).
[146] (Ngom, 2012), p. 127.
[147] Article 13(3) of the Supplementary Act No. A/SA.1/06/08 provides that '[i]*n the implementation of the Community Competition Rules, the Regional Authority shall collaborate with other existing competition agencies. (UEMOA)*.' The reference to the WAEMU/UEMOA in brackets might be interpreted as its being considered to be an NCA. Yet the provision remains ambiguous.

competition authority finds one (or more) WAEMU member state(s) individually to have infringed ECOWAS competition law. In this case there should be a possibility of individual representation of WAEMU member state governments/public institutions before the ECOWAS institutions, and of sanctioning those individual member states rather than the entire WAEMU region.

The second clear challenge to the enforcement of the ECOWAS competition law is the uncertain legal effect of the entire ECOWAS corpus of legislation before the national courts of ECOWAS member states. A clear regulation on the supremacy and direct effect of ECOWAS law could facilitate regional cooperation and accelerate the integration process. Nevertheless, even in the absence of supremacy and direct effect of ECOWAS law, regional competition enforcement can take place if ECOWAS member states will adopt legal mechanisms to put pressure on non-compliant member states, and to remedy their dilatory action (or inaction) that obstructs the effectiveness of the regional law and its enforcement.

Lastly, ECOWAS competition law could be implemented efficiently only when the domestic competition laws of all ECOWAS member states are sufficiently harmonized. Member states need to make the necessary reforms in their domestic legislation in order to ensure such compliance. As an example of the current inconsistencies, Ngom (2012) highlights the different definitions of abuse of dominance under WAEMU and ECOWAS competition laws.[148] In the absence of the necessary legal mechanisms to force member states to take legal action to give effect to regional arrangements, the feasibility of such reforms would be at the sole discretion of the national governments of ECOWAS member states.

It may be concluded that a number of legal reforms need to be instituted both at the regional level and in the national legislation of member states in order to establish a workable regionally integrated competition law enforcement system in the ECOWAS.[149] Moreover, the internal political and economic problems of the WAEMU

[148] (Ngom, 2012), p. 129.

[149] The regional competition law enforcement systems in the OECS and the CARICOM show certain similarities to regional competition law enforcement systems in the WAEMU and the ECOWAS. As mentioned earlier, the OECS member states have overlapping membership of the CARICOM, and compared with the CARICOM, they have achieved a deeper integration among themselves. (See Section 5.2 above.) The regional competition authority of the OECS will act as the national NCA of all OECS member states, also within the context of the competition law enforcement system at the CARICOM level. The main reason for this arrangement is the resource constraints of the OECS member states. Because the OECS bloc consists of nine microstates that share legal traditions and a common language,

in relation to competition law enforcement are likely to constitute a formidable challenge the success of the regional competition law regime in the ECOWAS region. The political commitment of the West African states to regional integrations in general, and to the regional competition law enforcement systems thereunder in particular, is likely to be the main determinant of the future efficacy of the respective regional arrangements.

The next section will discuss certain factors that are external to the broader integration under a deep RTA yet may adversely influence regionally integrated competition law enforcement.

Section 5.5 Other Relevant Factors and Limitations of the Work

The poor performance and/or stagnant progress of a regionally integrated competition law enforcement system under a deep RTA concluded between developing countries might also be related to factors that are external to the respective RTA. For instance, the dynamics of the domestic economies of member states might create political obstacles to the establishment of a competition law regime at the regional level. For instance, strong state presence in the domestic economies of member states or close personal ties between business elites and politicians might influence the political commitment of member states to a regionally integrated competition law enforcement system.

Secondly, as the discussion on the West African regional blocs in Section 5.4 above shows, institutional arrangements both at national and regional levels may create formidable obstacles to the workability of a regionally integrated competition law enforcement system.

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regional integration between the OECS states can develop more easily. In addition, as the OECS member states have already harmonized their laws and institutional structures in various policy areas, their joint action in the CARICOM competition law enforcement system might be smoother than the WAEMU's representation in the ECOWAS. On the other hand, CARICOM integration also suffers from slow regionalization and conflicting commitments under multiple RTAs. For instance, the Bahamas are a member of both the CARICOM and the CARIFORUM-EU Economic Partnership Agreement (EPA); however, it preferred to remain outside of the CARICOM Single Market and Economy (by not signing the RTC). Because the Bahamas are not a member of the CARICOM single market, the CARICOM's regional competition law enforcement rules are not applicable to the Bahamas. By contrast, however, the CARICOM Competition Authority is the only recognized authority in the CARICOM-EU EPA. See (Stewart, 2012), pp. 178 and 181.

Thirdly, differences in the legal systems, political history and cultural traditions of member states might further complicate regional cooperation, as shown by the ECOWAS experience examined above.

Fourthly, ambiguous laws and competition policy objectives may stimulate political conflict and obstruct the institution of a regional competition law regime. Although provisions defining core anti-competitive conduct show great similarities across all jurisdictions, the interpretation of these provisions in the light of the goals attributed to competition policy, and in line with this, the scope of exceptions and exemptions from competition law enforcement tend to be very diverse, particularly among developing countries. As discussed in the previous chapter, there is no consensus on the optimal goals of competition policy. In the specific case of developing countries, however, many competition experts argue that pursuance of broader policy goals is justifiable.[150] After all, as noted by McMahon (2013), '[in developing countries] *short-term social costs, including unemployment or more volatile pricing might not be easily justified by the possibility of more sustained consumer welfare in the longer term.*'[151] Transition to a free market economy accompanied by strictly economic efficiency-focussed competition law enforcement may create such 'unaffordable risks' for developing countries. Furthermore, as noted by Hyman and Kovacic (2013), in many countries the presence of non-efficiency objectives is a precondition of a coalition that will support the enactment of competition provisions in the first place.[152] In this respect, while on the one hand non-economic goals and sector-specific arrangements might avoid socio-political tensions, implementing overly broad exceptions would shrink the area that the competition policy regulates and thereby reduce the promised benefits of competition.[153]

Lastly, the sequence of the regional competition law enforcement[154], the policies adopted for raising public awareness of competition, and the checks and balances on competition agencies as well as on national governments that might have a possibility to

[150] Among others, (Eleanor M Fox, 2007, 2012); (Bakhoum, 2011) and; (Gal, 2004), p. 28.
[151] (McMahon, 2013), p. 222.
[152] (Hyman & Kovacic, 2013b), p. 2167.
[153] (Eleanor M Fox, 2007), pp. 121-2.
[154] Stewart emphasises the need for small economies '*to introduce competition law on a phased basis, to make administering and implementation manageable, and to make the law compatible with the level of development.*' (Stewart, 2000), p. 54. For a proposal on developing a competition law regime in two main phases, see (Kovacic, 1997), pp. 429-46.

interfere in legal enforcement[155] are among the factors that are likely to affect the efficacy of a regionally integrated competition law enforcement system.

As this chapter's objective has been to examine the link between deep RTAs and regionally integrated competition law enforcement systems thereunder, a detailed examination of the problems that may derive from the design of regional competition policy and institutions as well as national economic systems will not be taken further.[156] Moreover, since most of the subjects examined in this section closely relate to the internal dynamics of regional blocs, making a sound suggestion on adequate legal design would inevitably require an understanding of the historical, political, economic and cultural traditions of all member states of a given regional bloc. Although such deep analysis on the basis of individual regional blocs remains beyond the scope of this thesis, future research in this area would be useful.

Section 5.6 Conclusions

This thesis argues that the success of a regionally integrated competition law enforcement system established under a deep RTA is conditional on the success of the broader regional economic (and social) integration scheme under the same deep RTA. In line with this proposition, the present chapter has explored the disadvantages of this conditionality. Accordingly, the chapter examined the major disadvantages of developing a regional competition law enforcement system within the broader context of a deep RTA under four headings: (i) the risk of increased regional inequalities as a result of a deep RTA; (ii) persistent resource constraints and corruption; (iii) preference for intergovernmentalism over supranationalism; and (iv) lack of enforcement, the secondary role of regional competition policy, and conflicting competition policy commitments under multiple RTAs. The chapter also acknowledged that other factors concerning domestic economy as well as political, legal and institutional endowments of member states of a deep RTA might also have negative implications for the efficacy of regionally integrated competition law enforcement system.

[155] On the role of politics and the potential influence of governments on competition enforcement in developing countries, see (Dabbah, 2010), pp. 463-5.
[156] Although some of these issues are examined under Chapter 3 to the extent that they are relevant to the potential benefits and costs of regional competition agreements.

The next chapter will evaluate the findings of the first five chapters. Conclusions will then be drawn.

CHAPTER 6 CONCLUDING REMARKS

The core research question of this thesis is whether regionally integrated competition law enforcement systems in deep RTAs can help to address competition law enforcement problems of developing countries. This thesis has found that a well-working regionally integrated competition law enforcement system would help to deal with at least four fundamental problems faced by developing countries. A regionally integrated competition law enforcement system may (i) significantly reduce the cost of legal enforcement, (ii) limit the influence of vested interest groups on law-making and enforcement, (iii) improve the ability of competition authorities to sanction anticompetitive firms (by imposing large fines or other deterrent measures), and (iv) increase the bargaining power of parties in international negotiation. It is therefore concluded that regionally integrated competition law enforcement systems are, *at least in theory,* desirable from the perspective of developing countries.

Further research on the dynamics of regionally integrated competition law enforcement systems and their connection to deep RTAs, however, has revealed that the establishment of a regional competition law regime as a part of a broader regional economic (and social) integration agreement might face various problems concerning enforcement. It is fair to conclude that drawing general conclusions about the usefulness of regional competition law enforcement systems to developing countries is not possible. Instead, the subject obliges assessment of this question separately for each individual regional bloc, ideally with an understanding of the political, historical, economic, and cultural backgrounds of all national jurisdictions involved. Analysis of a regional bloc, however, inevitably requires a good knowledge of the general economic and political climate in which it operates. This thesis, therefore, examines the subject from an interdisciplinary perspective in the hope that this will improve current knowledge of the role of competition policy in deep regional integrations, and help to develop better informed and achievable competition policy solutions for the problems of existing regional competition law regimes established under RTAs between developing countries. In light of above, observations and conclusions of this thesis are presented below.

- The first and main finding of this thesis is that the success of a regionally integrated competition law enforcement system is conditional on the success of the relevant deep RTA. There are at least two justifications for this conclusion. Firstly, as a matter of fact all existing regionally integrated competition law enforcement systems are found in the context of a deep RTA. Revision of the objectives of the existing deep RTAs entered into by developing countries demonstrates that regional competition law and policy is sought to complement economic (and social) integration rather than constituting a goal of the respective deep RTAs in its own right. In line with this, national governments seem to have no political will to establish a regionally integrated competition law enforcement system in a stand-alone competition agreement. Secondly, the absence of the requisite political drive and determination to establish a regionally integrated competition law enforcement system independent of a deep RTA can be explained by the strategic importance of competition policy in today's liberalised economies. As competition law regulates the parameters of competitive conduct in markets[1], it is capable of having a direct influence on the operations of the markets and market players. In this regard, when competition enforcement is transferred to the regional level, regional institutions will gain the authority to oversee, and at times to interfere in the national markets of participating jurisdictions. This could be interpreted as a loss of control over a state's own markets.[2] Moreover, in the absence of a 'common market', joint competition enforcement at the regional level may lead to more conflicts between the national economic interests of participating countries. As a result, regionally integrated competition law enforcement systems appear to be unfavourable when parties are not engaged in a deep regional economic integration, and when they do not share sufficiently common economic interests. If true, then a regionally integrated competition law enforcement system is unlikely to become operational and effective before the relevant regional economic (and social) integration brings about sufficient (economic and other) returns to the participating jurisdictions.

[1] (Gerber, 2012), p. 261.
[2] Ibid.

- Examination of the economic and political dynamics of deep RTAs demonstrates that economic gains from a regional integration are often far from being definite. In the context of deep RTAs formed by developing countries, in particular, economic returns to some member states might be negligible or even negative. This economic outcome might be due, *among other things*, to low intra-regional trade, trade diversion, similar factor endowments of member states, and agglomeration. Moreover, geographical disadvantages of some member states (e.g. being landlocked) or political instabilities in one part of a regional bloc may further reduce the potential economic returns from regional integration. In this context, addressing inequalities between member states needs to be one of the primary objectives, if not the primary objective, of any deep RTA.
- In addressing regional inequalities most deep RTAs formed by developing countries employ direct compensation mechanisms. Although direct compensation might be a good immediate way of facilitating regional cooperation, in the long-term it is likely to lead to political tension on the side of both the compensator and compensated member states. Therefore long-term solutions to regional inequality should target disseminating economic activity across the region. In the special case of developing countries investment in soft and hard infrastructure and the abolition of tariff and non-tariff barriers to regional trade are critical. Efforts to redress regional inequalities are likely to have more significance for deep regional integration than the formation of a regional competition law regime at the initial stage. This is also consistent with the abovementioned observation that the success of a regionally integrated competition law enforcement system is dependent on the success of the broader integration in the relevant deep RTA. Accordingly, in the absence of sufficiently common economic interests, member states of a deep RTA are unlikely consent to the formation of (or support the operations of) a regional competition authority with supranational (law enforcement) power.
- Lax attitude towards the implementation of regional laws is a common problem of the regional blocs formed by developing countries. This problem also leads to overlapping RTA membership, and conflicting commitments of

states under different RTAs. The latter two issues can be interpreted as a lack of confidence in the cause of *deep* regional integration, and the desire to preserve control over national economic policy. Although a lax attitude towards regional integration might be helpful in promoting formal and informal communication between member states and enable them to undertake various infrastructural projects, it hinders progress towards 'deep regionalisation', and increases uncertainty surrounding legal enforcement.

- The extensive use of the 'variable geometry principle' is another common feature of many regional blocs formed by developing countries. While it is certainly true that variable geometry enables member states of a regional bloc to proceed with regionalisation at different speeds and at different depths, the offered flexibility is not always free from adverse economic and political implications. In economic terms the main idea of 'deep regionalisation' is the combining of all resources of a group of sovereign states in order for them to receive higher economic returns primarily as a result of better allocation of resources and scale economies. If a sub-group of member states agrees to implement an economic policy that will change the parameters and extent of economic activity in their national markets, this will inevitably influence the economic performance of the entire regional bloc. Depending on the level of regionalisation across a regional bloc, further economic integration of a sub-group of member states may have a favourable or adverse economic effect on the economies of the remaining member states and may therefore raise political tension.[3] (The EU's common monetary policy is a good example.) Moreover, from the perspective of regional blocs formed by developing countries, different speeds of regionalisation within a regional bloc together with a lax attitude towards legal enforcement and membership of multiple RTAs might contribute to the aggravation of the problems concerning transparency and legal certainty.

[3] Consequently, it might be advisable not to engage in further economic integration by applying the variable geometry principle if some member states do not intend to catch up with this deeper level of integration in the longer term. In some cases, however, objecting to the further integration of other member states might not be politically feasible for all member states, depending on their strategic importance to the entire regional bloc.

- Due to uncertainties about the feasibility of achieving the projected economic and political gains from regionalisation most deep RTAs between developing countries suffer from the lack of implementation.
- In the absence of reliable prospects of positive economic returns from regional integration, member states will be unlikely to surrender their sovereign powers to a regional authority. Parties may refrain from the establishment of regional institutions with adequate (supranational) powers. With respect to regional competition law enforcement, until the necessary powers and resources are provided to the regional competition authority, the political benefits expected from the regionalisation of competition law enforcement, such as limiting the adverse effect of corruption and the pressure of vested interest groups, will not be realised.
- A disadvantage of regionally integrated competition law enforcement systems is that while they require considerable investment in legal harmonisation and institution-building at the initial stage, they bring about their benefits only in the longer term - after workable legal, financial and institutional arrangements are in place. As a result, establishment of a fully functioning regionally integrated competition law enforcement system requires the long-term political commitment of member states.
- Due to the dependency of the success of a regional competition law regime on the success of broader economic (and social) integration, ensuring the coherence of the regional competition policy with the objectives of the broader regional integration scheme is critical. As regards regional blocs consisting of developing countries, policy coherence might be possible only when the regional competition laws take the necessary measures ensuring special treatment of certain groups, such as small businesses, strategic industries or historically disadvantaged persons.
- The dependency of the success of a regionally integrated competition law enforcement system on the success of the relevant regional economic (and social) integration also justifies the pursuance of the so-called ‘single market objective’ in regional competition law enforcement. As a desirable side effect, the single market objective might increase political support of the

national governments of member states of a deep RTA for the relevant regional competition law enforcement system. However, this positive influence may occur only after the regional competition law enforcement system becomes operational.

- Even when a regional competition policy under a deep RTA respects the political sensitivities of all member states, developing country governments might not have enough resources and/or political will to implement the regional competition legislation. Accordingly, depending on the internal dynamics of a regional integration, harmonisation of national competition law and practice might be delayed, and the budget for regional institutions might not be provided. In this regard, one can expect only gradual development in regional competition law regimes. Accordingly, regional competition authorities, if present, can be advised to prioritise their activities by refraining from adjudicating cases that may raise political or economic disputes among member states. Potential conflicts should be avoided especially at the early years of practice of a regional competition authority.[4] It is equally important for a regional competition authority to prioritise public awareness campaigns advertising the benefits of competition in order for it to receive political support for legal enforcement.

In light of the above it is submitted that having common economic interests is vital to active cooperation in trade-related policy areas, including competition policy, at the regional level. A regionally integrated competition law enforcement system is more likely to succeed when the relevant RTA achieves a degree of interdependency between the economies of member states, and thereby broadens the scope of common economic interests of the parties. With respect to regional blocs consisting of developing countries, in particular, it is believed that only then would there be enough political dedication to proceed with deep regional integration. In order to achieve a workable regional competition policy, parties to a deep RTA might need to adopt unconventional policy objectives while observing the political sensitivities of one another. Even then, however, issues of resource constraint and good governance would need to be tackled in or independently of regional integration agreements.

[4] 'As noted by Kovacic '[n]*ew competition bodies continually must ask whether the exercise of nominally significant powers will arouse debilitating political opposition*' [(Kovacic, 2001), pp. 305].

In sum, this thesis suggests that the following four factors are the main determinants of the success of a regionally integrated competition law enforcement system in a deep RTA concluded by and between developing countries:

i. the success of the deep economic (as well as social) integration between member states;

ii. coherence of regional competition policy with the broader objectives of the respective regional integration;

iii. long-term political backing of all member states; and

iv. presence of adequate institutions (with sufficient autonomy and resources) both at regional and national levels.

The findings of this thesis might also be useful to discussion on how best to promote existing regionally integrated competition law enforcement systems under deep RTAs concluded between developing countries. In the light of the above, strengthening the overall design of deep RTAs with an awareness that a sustainable regional solution could only be reached when regional integration is to the benefit of all member states in a reasonable future timespan is critical. It is advisable to adopt precise and achievable regional development targets and to aim at reducing regional inequalities. Likewise, reaching to a clear understanding on the fundamental principles of a regional integration would inform further legislation, and guide the legal enforcement activities of the judiciary.

The above factors, however, are likely to require developing countries to make a conscious choice about which regional bloc they would like to be engaged with in the future. As made clear in Section 5.4 of Chapter 5 above, overlapping membership of multiple deep RTAs is a formidable obstacle to furthering regionalisation. If Gathii (2010) is right in his observation that a key factor for African states in favouring multiple RTA membership is the expectation of benefit from specific infrastructural or water-related projects, then it might be an option to reduce the subject of such agreements to attainment of the objectives of the respective projects.[5] More generally, however, the intention to have a choice between multiple custom duties under multiple RTAs constitutes a great risk to legal certainty, and to building trust between parties to respective regional integrations. It appears to be crucial for developing countries to

[5] (Gathii, 2010), pp. 584-7.

affiliate themselves primarily with one regional bloc at the expense of certain advantages other regional blocs would offer if they wish to reap the benefits of *deep* regional integration.

In order to observe the national interests of all member states, besides eliminating barriers to trade, regional blocs should ideally focus on developing soft and hard infrastructure in parallel with instituting the necessary legal reforms for good governance and establishing the so-called four freedoms (i.e. free movement of goods, services and workers, and the right of establishment).

Before the necessary substantial reforms for deep regionalisation are made, *competition law enforcement* at the regional level is highly likely to take a back seat in regional policy making. Although it is true that in the EU experience competition policy was one of the main drivers of deep regionalisation, in the context of the current political dynamics governing regional cooperation between developing countries, this is unlikely to be the case at least in the initial years of cooperation. This difference might be explained by (a) extensive resource constraints and far less encouraging economic prospects of most developing countries than those of EU member states in the early years of European integration, (b) the lack of suitable institutional or legal structures, and (c) (compared with the early years of the EU) more readily available knowledge on the way competition law operates across the liberal economies of the world. Once the necessary resources are found and legal arrangements made for the establishment of a regional competition law enforcement system, however, communication between public and private sectors and competition authorities might help furthering regionalisation.[6] Depending on their level of autonomy, regional competition authorities can help developing a competition culture by communicating their opinion on potential anticompetitive effects of certain government measures, or by seeking the opinion of consumer groups and private businesses on the likely effects of a competition case under investigation. Such awareness of competition would help to the healthy

[6] Given his previous work with NCAs of numerous *transition* economies, Kovacic identifies five key tasks for the initial phase of building a new competition law regime: '*establishing the competition policy agency, carrying out an education and publicity programme for the new competition policy system, formulating a substantive research agenda, initiating a competition agency programme, and enhancing the capability of collateral institutions that are important to implementing substantive legal commands*.' To achieve publicity, the author emphasises, *inter alia*, the importance of educating consumers, business leaders and government officials, developing ties with media organisations, and designing guidelines and protocols in order to create an awareness on how the substantive law will be applied in practice. (Kovacic, 1997), pp. 430-41.

functioning of free market, and regionalisation. To integrating regional competition policy in the broader regional integration anticipated under a deep RTA, having the full political support of some strategically strong, if not all, member states is crucial. Political support can be gained by engaging in public awareness campaigns, lobbying, and more importantly by avoiding controversial decisions at the early stages of regional enforcement activities. In addition, in order to limit the adverse effects of competition law enforcement on the poorest, and thereby to receive presumably wider political support, competition authorities, regional or national, might be advised to focus on sectors that would positively influence the poor and small businesses the most.[7]

Another at least equally important matter is the coherence of regional competition policy with the broader objectives of the relevant regional integration. Although determination of the optimal goals for competition law in general, and regional competition law in particular, is a highly controversial subject, strengthening regional integration, dynamic efficiency, significant employment opportunities, and environmental interests might be among the subjects that could be considered in competition law policy. While broadly defined goals might increase the political significance of competition policy and thereby receive political support, they would complicate competition law assessment, put legal certainty at risk, and make competition enforcement institutions more vulnerable to political pressure. The right balance between the pros and cons of broader competition policy objectives is to be decided by the parties to a regional integration.

The above suggestions might be helpful in understanding and addressing the problem of stagnation and lack of implementation of regionally integrated competition law enforcement systems established under deep RTAs formed by developing countries. However, as mentioned above, the optimal regional competition policy design under such deep RTAs would require individual tailoring for each regional bloc by taking into account the particular economic, social and political traditions of all respective national jurisdictions.

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[7] '[I]*f competition* [policy] *want*[s] *to reduce poverty,* [it is] *likely to have the greatest effect when focusing on markets in which poor people spend most of their income (essential goods and services), on markets that facilitate small entrepreneurs' success (banking and communications services), and on labour-intensive sectors that employ the poor.*' - (West & Tari, 2013), p. 66.

APPENDIX 1 CONCEPTUAL CLARIFICATIONS

The sections below will first define the key concepts used in this thesis and then explain different levels of regional economic integration under RTAs.

Section 1 Definition of 'Competition Policy' and 'Competition Law'

'*Competition policy*', in the broadest sense, can be defined as '*all policies that affect competition, or contestability (potential competition) in a market, including trade and regulatory policies as well as competition or antitrust law.*'[1] '*Competition law*', on the other hand, is one sub-set of the competition policy which can be defined as '*the set of laws and policies adopted by a country to prevent or remedy restrictive business practices by enterprises, whether private or public.*'[2] Conventionally, competition law concerns unilateral and collusive conduct that is directed at restricting competition, and mergers and acquisitions (M&As).

In this thesis the terms 'competition policy' and 'competition law' will carry the above-stated meanings unless the text explicitly states otherwise.

Section 2 Definitions of 'Developing Countries'

There is no universally applied method for the designation of '*developed*' and '*developing*' countries.[3] Development level of a country, however, is always assessed relative to other countries. Because 'development' can be obtained in numerous economic, social and political spheres, depending on the purpose of each comparative study, the set of indicators considered for designating country groups can vary significantly. In this context, indicators such as national gross income, acknowledgement of human rights, the state of education, healthcare, gender equality,

[1] The definition is barrowed from the World Bank's official website, available at: http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTPROGRAMS/EXTTRADERESEARCH/0,,contentMDK:21072429~pagePK:64168182~piPK:64168060~theSitePK:544849,00.html (accessed on June 16, 2014)

[2] Ibid.

[3] The UN also acknowledges the absence of a universal system for the designation of developed and developing countries. See footnote (c) at: http://unstats.un.org/unsd/methods/m49/m49regin.htm (accessed on June 16, 2014).

infrastructure, governance system, and disaster preparedness are often taken into account in determining the development level of countries or regions.

Categorising countries based on their per capita GDP is a commonly applied method of economic analysis.[4] The latest figures published by the UNCTAD divide developing countries into three sub-groups according to their average per capita GDP as follows: high-income (above $4 500), middle-income (between $1 000 and $4 500) and low-income (below $1 000).[5]

From a broader perspective, which considers certain social and geographical indicators in addition to per capita GDP, the UNCTAD studies socio-economic performance of developing countries under different sub-categories. The following country groups, in particular, are widely used in academic studies:

(i) *Least developed countries (LDCs):* Countries in this category are considered to be severely disadvantaged in obtaining development, and are highly vulnerable to poverty. Three criteria are used to determine LDC status: (a) per capita income, (b) human assets (indicators of nutrition, health, school enrolment and literacy), and (c) economic vulnerability (indicators of natural or trade-related shocks, physical and economic exposure to shocks, and smallness and remoteness).[6]

(ii) *Landlocked developing countries (LLDCs):* Countries in this category face significant obstacles to obtaining development due to direct or indirect effects of their geographical position, e.g. lack of access to the sea and

[4] Classifications based on per capita GDP merely aim at statistical convenience in economic analysis; thus per capita GDP indicator alone is not capable of reflecting the overall development level of a country.

[5] (UNCTAD, 2013b), p. xi (the full list of country classifications according to the geographical regions and development status is available between p. xii-xx).

[6] 'The latter two are measured by two indices of structural impediments, namely the human assets index and the economic vulnerability index:

- *Low-income criterion*, based on a three-year average estimate of GNI per capita, based on the World Bank Atlas method (under $992 for inclusion, above $ 1,190 for graduation as applied in the 2012 triennial review).
- *Human Assets Index (HAI)* based on indicators of: (a) nutrition: percentage of population undernourished; (b) health: mortality rate for children aged five years or under; (c) education: the gross secondary school enrolment ratio; and (d) adult literacy rate.
- *Economic Vulnerability Index (EVI)* based on indicators of: (a) population size; (b) remoteness; (c) merchandise export concentration; (d) share of agriculture, forestry and fisheries in gross domestic product; (e) share of population living in low elevated coastal zones; (f) instability of exports of goods and services; (g) victims of natural disasters; and (h) instability of agricultural production.'

See, http://unohrlls.org/about-ldcs/criteria-for-ldcs/ (accessed on June 16, 2014).

remoteness from world markets. This may hinder development by leading to high transport costs, reduced international competitiveness, and dependency on transit via other countries.[7]

(iii) *Small island developing countries (SIDCs):* This group was first recognised as a distinctive sub-category of developing countries facing specific social, economic and environmental vulnerabilities only in June 1992.[8] SIDCs, are confronted by major disadvantages deriving from the small size of the economy (which prevents domestic firms from enjoying the benefits of economies of scale), remoteness from world markets, and fragile natural environment. Three geographical regions are identified as the location of SIDCs: (a) the Caribbean, (b) the Pacific and the Atlantic Ocean, and (c) the Indian Ocean, Mediterranean and South China Sea.[9]

(iv) *Transition countries:* These are in transition from centrally planned to market economies.[10]

Although the term 'developing countries' and its above-mentioned sub-categories are widely used in many studies, and by various multinational organisations, different indicators and/or thresholds can be applied for the determination of the country group in a particular study. Respective country groups may also be designated by flexible methods. For example, the 2014 IMF World Economic Outlook divides countries primarily into two major categories: (i) advanced economies, and (ii) emerging and developing economies. This classification, the IMF notes, '*is not based on strict criteria, economic or otherwise, but instead has evolved over time with the objective of facilitating analysis by providing a reasonably meaningful organization of the data*.'[11]

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[7] Currently 31 countries belong to the group of LLDCs: 15 are in Africa, 12 in Asia, 2 in Latin America and 2 in Central and Eastern Europe. Of these 31 countries, 16 are classified as LDCs. For more information, see: http://unohrlls.org/about-lldcs/ (accessed on June 16, 2014).

[8] SIDC status was recognised as a distinct category at the United Nations Conference on Environment and Development held in Rio de Janeiro on 3-14 June 1992. For further detail, please see http://unohrlls.org/about-sids/ (accessed on June 16, 2014).

[9] Ibid.

[10] Assessment under UNCTAD Trade and Development Report 2013 is based on three main categories:

- Developed or Industrial(ised) Countries: members of the OECD (other than Chile, Mexico, the Republic of Korea, and Turkey) plus all other EU member states;
- Transition Economies: South-East Europe, the Commonwealth of Independent States (CIS) and Georgia;
- Developing Countries: all countries, territories or areas not specified above.

See (UNCTAD, 2013d), p. xi.

[11] (IMF, 2014), Statistical Appendix, p. 157.

The purposes of this study do not require a clear list of developing countries, or indicators that should be considered for such categorisation. It would be sufficient for the reader to relate developing country status to low per capita GDP, low trade, limited infrastructure, limited finance, and comparatively low advancement in education, health services and other social areas. The findings of this thesis are likely to be applicable to countries with poor performance in all or most of these areas. Moreover, the main criteria used by UNCTAD for determination of the above-mentioned sub-categories of developing countries (LDCs, LLDCs, etc.) are representative for the use of the respective terms throughout this thesis.

In addition, the terms 'advanced economies', 'industrialised countries' and 'developed economies' are used interchangeably to refer to countries that are not considered developing countries. Likewise, the term 'economy' may be used to describe a 'country'.

Section 3 Definition of 'Regional Trade Agreements' and Different Levels of Regional Economic Integration

Despite adopting the term 'regional' in its title, an RTA does not need to be concluded between countries belonging to the same geographical region. In broad terms, an RTA is a reciprocal agreement, between two or more jurisdictions, that aim at increasing trade between its signatories. For this purpose an RTA includes at least two sets of rules: (a) provisions for the elimination of national measures that restrict intra-regional trade, and (b) provisions for increasing policy coordination across the region. In this context, increased trade between independent jurisdictions, in the long term, may prepare the ground for regional economic integration. Depending on economic, historical and cultural ties between the signatory jurisdictions, an RTA may be designed to achieve different levels of economic integration.

As a general concept, agreements establishing preferential treatment in cross-border trade among signatory countries are called '*preferential trade agreements*' (PTAs). Reduction of barriers to cross-border trade under preferential trade agreements mainly occur via application of *lower (but not necessarily zero) tariffs* to the internal trade of *a*

defined list of goods and/or services.[12] Some sources, however, use the term PTA as an umbrella term for all bilateral or multilateral agreements providing the parties preferential access to one another's market (including agreements promoting deeper regional economic integration).

Different stages of economic integration are usually examined in four groups[13]: (a) free trade area, (b) custom union, (c) common market, and (d) economic union. A step

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[12] The geographical area formed by signatory states of a preferential trade agreement is called 'preferential trade bloc' (also preferential trade area). The same applies to other levels of regional economic integration agreement.

[13] The taxonomy used by the WTO distinguishes between RTAs that concern trade in goods and those that concern to trade in services. However, in this and many other studies this distinction is ignored and the terms FTA, CU, CM and economic union are used to include trade in both goods and services. [For acknowledgment of this divergence from the WTO's taxonomy, see (J. Gerber, 2010).]

According to the WTO taxonomy, there are four types of RTA that should be notified to the WTO by its members: (i) free trade agreements, (ii) customs union agreements, (iii) economic integration agreements, (iv) partial scope agreements. The terms 'customs union' and 'free trade area' (FTAs) are defined in Paragraph 8 of Article XXIV of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Respective provision rules are as follows:

'8. For the purposes of this Agreement:

*(a) **A customs union** shall be understood to mean the substitution of a single customs territory[13] for two or more customs territories, so that*

*(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to **substantially all the trade** between the constituent territories of the union **or** at least with respect to **substantially all the trade in products** originating in such territories, **and**,*

*(ii) subject to the provisions of paragraph 9, substantially **the same duties and other regulations of commerce** are applied by each of the members of the union **to the trade of territories not included in the union**;*

*(b) **A free-trade area** shall be understood to mean a group of two or more custom territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on **substantially all the trade between the constituent territories in products** originating in such territories.'*[13] (Emphasis added.)

Pursuant to the above definitions, both CUs and FTAs concern elimination of restrictions to intra-region trading of goods (i.e. reduction of tariff duties to zero and removal of non-tariff trade restrictions). Unlike free trade agreements, custom union agreements oblige their member states to establish and comply with common external tariffs and trade policies against third states.

Economic integration agreements (EIAs) are defined in Article V of the General Agreement on Trade in Services (GATS). Pursuant to the respective provision, an EIA concerns '*liberalising trade **in services***' between or among the participant states, '*provided that such an agreement:*

*a) has **substantial sectoral coverage**, and*

*b) provides for **the absence or elimination of substantially all discrimination**, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:*

(i) elimination of existing discriminatory measures, and/or

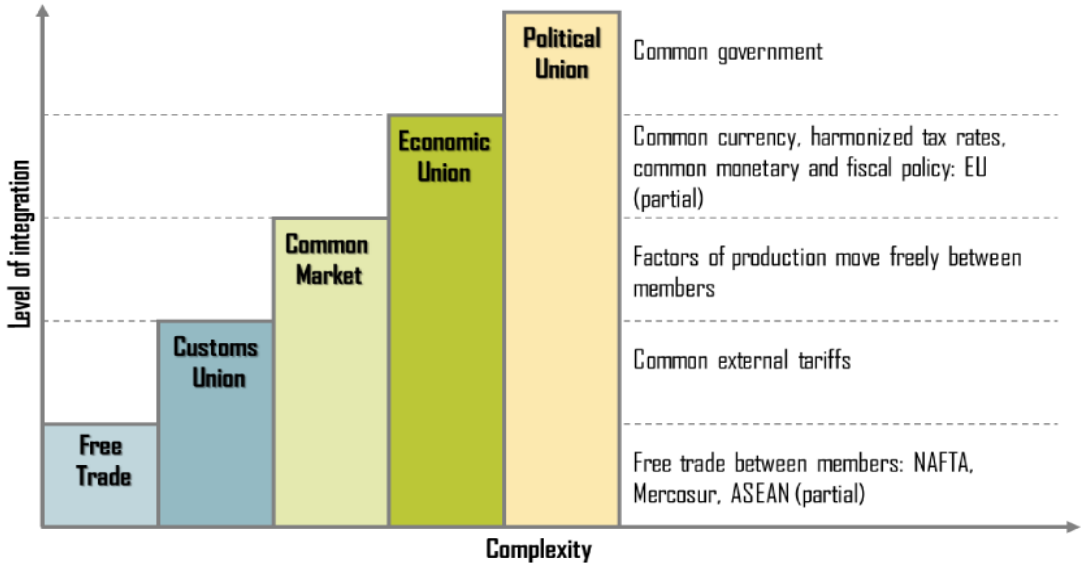
(ii) prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.' (Emphasis added.)

Partial scope agreements are not defined or explicitly referred to in any of the WTO agreements. That said, pursuant to the explanations in the official website of the WTO, 'partial scope' indicates that "*the agreement covers only certain products*" [see, http://rtais.wto.org/UserGuide/RTAIS_USER_GUIDE_EN.html#_Toc201649637 (accessed on June 18, 2014].

further than economic union is considered to be political union. For the purposes of this thesis, the five stages of regional integration are considered to have the following meanings:

Levels of Regional Integration



Source: Replicated from Rodrigue et al. (2013)[14]

Free trade agreements aim at forming a regional bloc in which tariffs and other duties on trade between member states are significantly reduced or abolished. These agreements are intended mainly to promote efficiency gains in production, and do not affect external tariffs imposed by the parties (i.e. national tariffs imposed by member states on third countries).

In regional blocs formed by a **customs union agreement**, member states eliminate or significantly reduce tariffs and other duties on intra-regional trade, and implement a common tariff for trade with third countries.

In **common markets** member states not only significantly reduce or eliminate tariffs and other duties on intra-regional trade and implement common external tax, but also ensure free movement of capital and people between member states.

[14] (Rodrigue, Comtois, & Slack, 2013).

The highest level of *economic* integration, **(full) economic union**, occurs where the member states forming a common market harmonise their broader economic policies on macro-economic and regulatory levels. The level of economic integration in economic unions often involves the use of common currency, common monetary and fiscal policies, and harmonised tax rates. The EU is currently the most prominent regional bloc that is moving towards a full economic union.

A step further from full economic integration is the integration of social policies and political governance. A regional bloc under a common government would constitute a **political union**.

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